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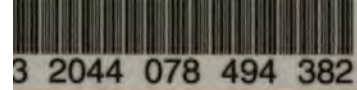
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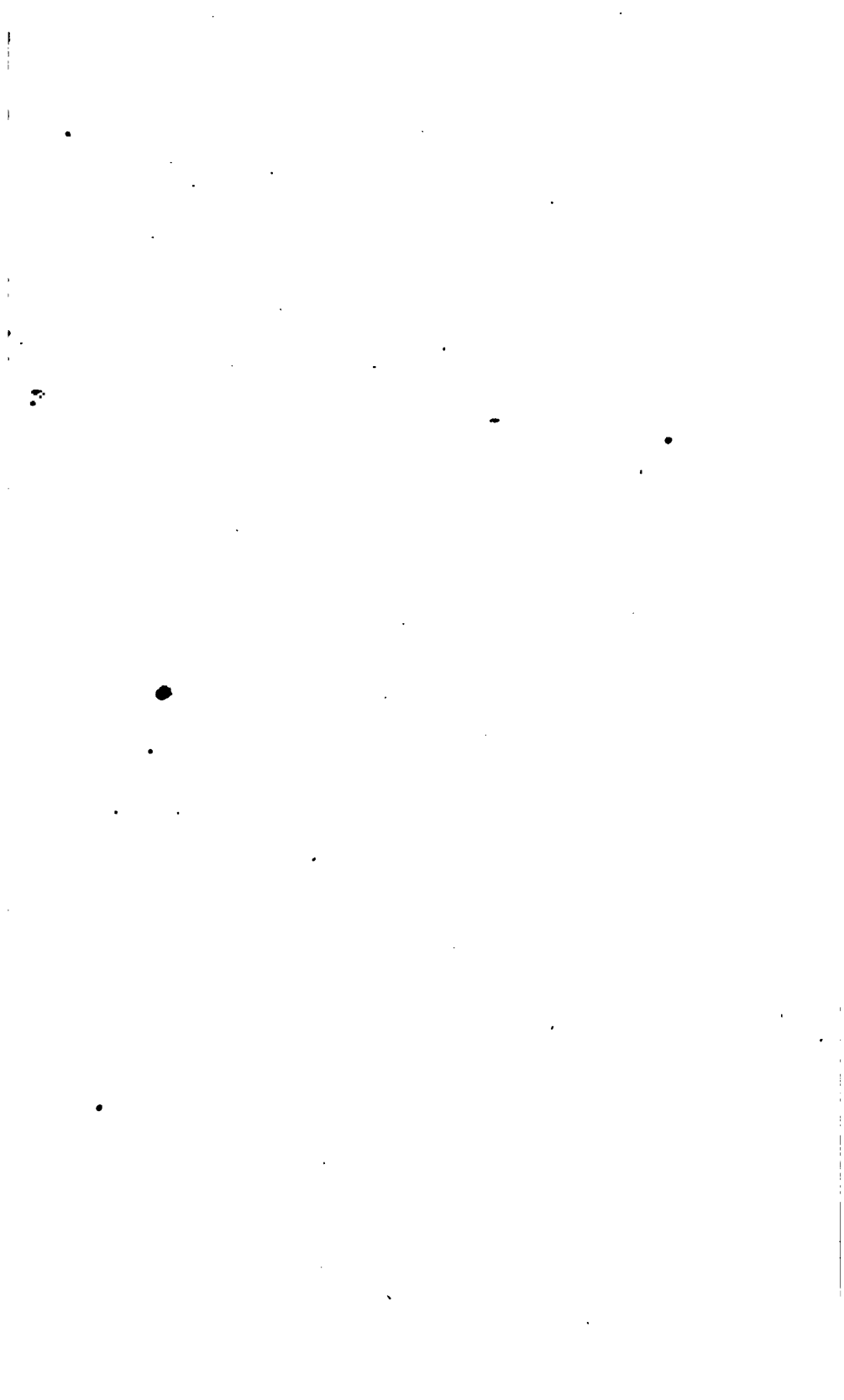


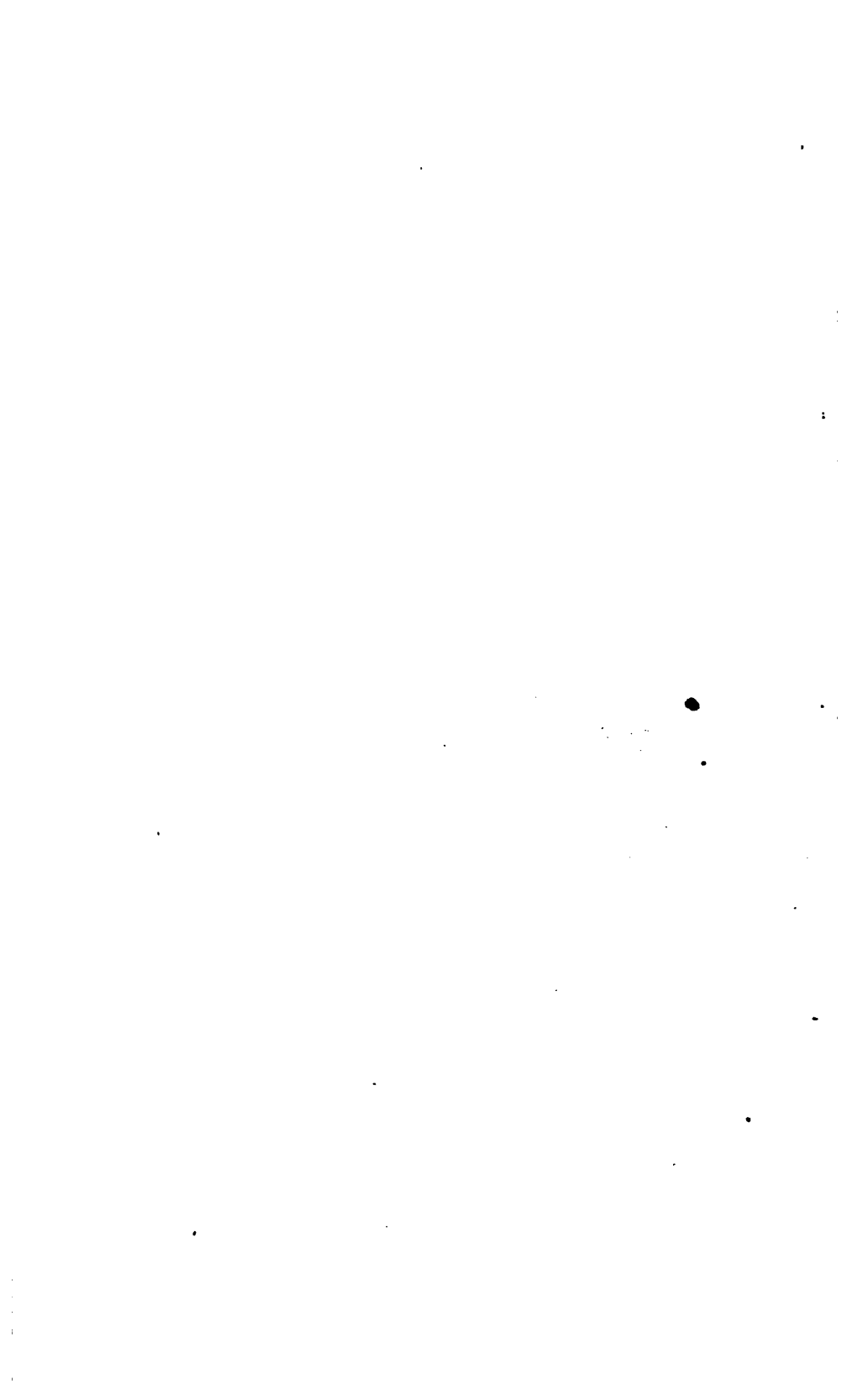
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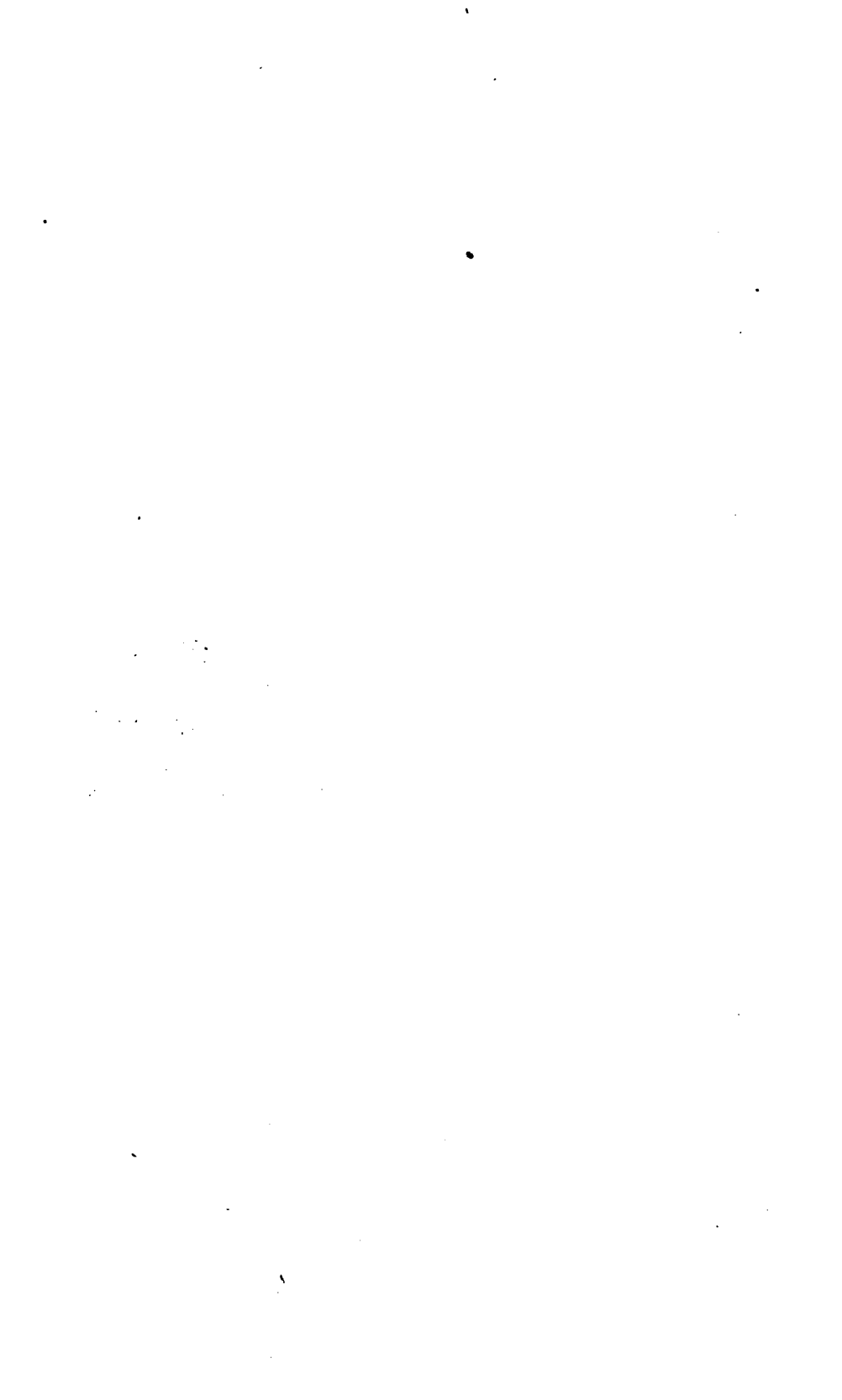




INDIANA REPORTS.

VOL. XXII.





Nov. 1

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA.

WITH TABLES OF CASES AND PRINCIPAL MATTERS.

BY MICHAEL C. KERR,
OFFICIAL REPORTER.



VOL. XXII.

**CONTAINING THE CASES DECIDED AT THE MAY TERM, 1864,
TOGETHER WITH CERTAIN CASES DECIDED AT PRE-
VIOUS TERMS, AND HELD OVER ON PETITION
FOR REHEARING OR OTHERWISE.**

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J U D G E S
O F T H E
S U P R E M E C O U R T O F J U D I C A T U R E
O F T H E
S T A T E O F I N D I A N A ,
D U R I N G T H E P E R I O D E M B R A C E D I N T H I S V O L U M E .

JAMES L. WORDEN,
JAMES M. HANNA,
SAMUEL E. PERKINS,
ANDREW DAVISON.

Judge WORDEN was Chief Justice at the May Term, 1864.

JOHN P. JONES, Clerk of Supreme Court.

HENRY H. NELSON, Sheriff of Supreme Court.



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DURING THE

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Names.	Date of Commission.	Circuit.	Residence.
JOSEPH W. CHAPMAN,.....	Oct. 27, 1858...	1...	Madison.
GEORGE A. BICKNELL,	Dec. 25, 1858...	2...	New Albany.
MICHAEL F. BURKE,.....	Nov. 6, 1858...	3...	Washington.
REUBEN D. LOGAN,.....	Nov. 7, 1858...	4...	Rushville.
FABIUS M. FINCH,.....	Oct. 24, 1859...	5...	Franklin.
SOLOMON CLAYPOOL,.....	Nov. 6, 1858...	6...	Terre Haute.
JOSEPH S. BUCKLES,.....	Oct. 26, 1858...	7...	Muncie.
JOHN M. COWAN,.....	Nov. 1, 1858...	8...	Frankfort.
ANDREW L. OSBORN,	Nov. 16, 1857...	9...	LaPorte.
EDWARD R. WILSON,.....	Oct. 25, 1858...	10...	Fort Wayne.
HORACE P. BIDDLE,.....	Oct. 26, 1860...	11...	Logansport.
CHARLES H. TEST,.....	Oct. 27, 1857...	12...	Lafayette.
JEHU T. ELLIOTT,.....	Oct. 21, 1861...	13...	New Castle.
WILLIAM F. PARRETT,.....	Nov. 5, 1859...	15...	Booneville.

LIST OF JUDGES
OF THE
COURTS OF COMMON PLEAS
IN THE
STATE OF INDIANA,
DURING THE
PERIOD EMBRACED IN THIS VOLUME.

Names.	Date of Commission.	Dist.
JOHN PITCHER,.....	Oct. 25, 1860.	1
RICHARD A. CLEMENTS,.....	Oct. 26, 1860.....	2
DAVID T. LAIRD,.....	Nov. 1, 1862.....	3
WILLIAM W. GILLILAND	Apr. 28, 1864.....	4
FRANCIS ATKINSON,.....	Oct. 26, 1860.....	5
JEREMIAH M. WILSON,.....	Oct. 26, 1860.....	6
BEATTIE McCLELLAN,.....	Nov. 1, 1862.....	7
GEORGE A. BUSKIRK,.....	Oct. 26, 1860.....	8
FREDERICK T. BROWN,.....	Oct. 26, 1860.....	9
CHAMBERS Y. PATTERSON,.....	Oct. 20, 1860.....	10
DAVID S. GOODING,.....	Oct. 18, 1861.....	11
CHARLES A. RAY,.....	Nov. 1, 1862.....	12
ISAAC NAYLOR,	Oct. 25, 1860.....	13
JOHN GREEN,.....	Oct. 26, 1860.....	14
DAVID P. VINTON,.....	Oct. 28, 1861.....	15
WILLIAM C. TALCOTT,.....	Oct. 25, 1860.....	16
ELISHA EGBERT,	Oct. 25, 1860	17
JACOB M. HAYNES,.....	Oct. 25, 1860.....	18
WILLIAM M. CLAPP,.....	Oct. 25, 1860.....	19
JOSEPH BRECKINRIDGE,.....	Oct. 27, 1860.....	20
DAVID D. DYKEMAN,.....	Nov. 1, 1862.....	21

ATTORNEYS

ADMITTED MAY TERM, 1864.

JOHN H. BAKER.
FIELDING BERRY.
JOHN S. PETTIT.
CALVIN COWGILL.
ISAAC M. HALL.
CHARLES P. JACOBS, JR.
EDWARD C. BUSKIRK.
ALFRED ENNIS.
WILLIAM W. H. McCURDY.

(xiv)

RULES ADOPTED MAY TERM, 1864.

No. 44. Where an appeal is taken in term, as provided for in section 555 of the code, and the transcript is not filed in the office of the clerk of this Court within the time limited by that section, the appeal so taken shall be deemed to have been abandoned, and, if a transcript is afterwards filed, an appeal shall be considered as taken by the filing of the transcript and issuing notice as provided for in the next following section of the code, and the appellees, in such case, shall not be regarded as in Court, without notice or voluntary appearance.

No. 45. Where an appeal is taken after the close of the term by notice below, as provided for by the first branch of section 556 of the code, the transcript must be filed within sixty days from the time of taking the appeal; otherwise the appeal so taken will be deemed to have been abandoned, and, if a transcript is afterwards filed, an appeal shall be considered as taken by the filing of the transcript and issuing notice as specified in the foregoing rule, and the appellees shall not be regarded as in Court without further notice or voluntary appearance.

N O T E.

THAYER }
v. } November 29, 1864.
HEDGES. }

The *pro forma* judgment in this case, reported in this volume at page 282, affirming the judgment below, is now reconsidered by the Court, and the cause, as to the judgment proper to be rendered, is still under advisement.





CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1864, IN THE FORTY-
EIGHTH YEAR OF THE STATE.

39	1
135	126
137	94
22	1
138	450
139	248
22	1
151	513

CORDELL v. THE STATE.

ADJOURNED TERM—PRACTICE.—A defendant in an indictment for murder, applied for a change of venue on account of the prejudice of the judge of the Court. The application was made, on the last day of the regular term of the Court, as fixed by law. It was granted, and the Court adjourned to a day fixed, pursuant to the act of *February 12, 1855*, 2 G. & H. 11, and another judge was called in to try the cause. The order for the adjournment, and the publication of the notice were noted, by the clerk, on the blotter, and the notice made out, handed to the printer, and published in the paper, before the minutes were made out and signed. On the day to which the regular term was adjourned, the judge appeared and took his seat on the bench, heard proof of the order adjourning the term, &c., signed the minutes of the proceedings of the Court, thus far, and then gave place to the judge who had been called in to try the cause, who appeared pursuant to appointment, to preside at the trial. After he had taken his seat on the bench, the defendant objected to being tried before him, on the ground that "at the time of public notice being given of the present adjourned term, and order-

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Cordell v. the State.

ing publication to be made, said order had not been signed by the regular judge of the Court."

Held, That there was no irregularity in the proceeding adjourning the term of the Court.

STATUTES—REPEAL.—The act of *February* 12, 1855, 2 G. & H. 11, providing for extending the terms of Circuit Courts, by adjournment, &c., was not repealed by the act of *December* 24, 1858, *id.*, but is still in force.

SAME.—The re-enactment of an existing provision of law, in a later statute, does not necessarily repeal such former provision.

SAME—INOPERATIVE.—The act of *December* 24, 1858, 2 G. & H. 11, did not pass both houses of the legislature, and consequently never became a law.

INDICTMENT FOR MURDER.—For a sufficient form of an indictment for murder, under the code, see the opinion.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—An indictment as follows was duly returned into the *Floyd* Circuit Court:

"The grand jurors for the county of *Floyd*, in the State of *Indiana*, upon their oath present, that *Thomas Cordell*, on the 17th day of *May*, 1863, at the county of *Floyd* aforesaid, did feloniously, purposely, and with premeditated malice, unlawfully kill and murder *Patrick Quirk*, by then and there feloniously, purposely, and with premeditated malice, cutting, stabbing, and mortally wounding said *Patrick Quirk*, with a knife which he, the said *Thomas Cordell*, then and there had and held in his hands contrary to the form of the statute, &c., and against the peace, &c.

"**THOMAS M. BROWN**, Pros. Att'y.

"A true bill: **CHARLES FREDERICK**, Foreman."

The defendant appeared and made three successive motions to continue the cause, which were overruled.

He, then applied for a change of venue on account of

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prejudice in the county against him. This was overruled. Then he made an application on account of prejudice of the judge, which was granted, and Judge *Chapman* was called in to try the cause at a day of the term adjourned, pursuant to the act of 1855, the application for the change being made on the last day of the session as continuing under the general provisions of the law. On the day to which the regular term was adjourned, Judge *Bicknell*, the judge of the Court, appeared and took his seat upon the bench, heard proof of the publication of the order adjourning the term, &c., signed the minutes of the proceedings of the Court, thus far, and then gave place to Judge *Chapman*, who appeared, pursuant to appointment, to preside at the trial of the case of *The State v. Cordell*. After Judge *Chapman* had taken his seat upon the bench, the defendant objected to being tried before him, on the ground that "at the time of public notice being given of the present adjourned term, and ordering publication to be made, said order had not been signed by the regular judge of the *Floyd* Circuit Court."

This objection admits the order to have been regularly made. It amounts to this: On *Saturday*, of a given week, the regular term of the *Floyd* Circuit Court closes. The business of the term is not completed. On the opening of Court in the afternoon of such *Saturday*, the judge orders that on the closing of the business of the day, the term be adjourned to a day named in future, and that the Clerk give notice of the adjournment, by publication. The Clerk notices the order of adjournment and publication on the blotter, makes out the notice, hands it to the printer, and it appears in the ensuing edition of his paper, before the Clerk has been able to make out the complete minutes of the proceedings of the Court, for the day, for the signature of the judge. Such a state of facts, it is claimed, destroys the legality of the order adjourning the term, and deprives the judge at the

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adjourned term of jurisdiction. We do not think so. We see nothing irregular in the proceeding. *Green v. White*, 18 Ind. 817.

But it is further claimed that the adjourned term itself was unauthorized by law, and hence its proceedings were all void. This position is taken upon the fact, assumed, that the law of 1855, authorizing such terms, was repealed by a law of 1858.

We think the act of 1855 is still in force.

1. The act of 1858 did not repeal the act of 1855, supposing the act of 1858 to be a valid statute. The act of 1855 simply provided for extending the regular term of the Court so long as might be necessary to finish the business pending therein; the act of 1858 contained exactly the same provision, with some unimportant additions as to matters of detail, and a further provision authorizing special terms also. See 2 G. & H. pp. 11 and 372.

But the re-enactment of an existing provision of law, in a later statute, does not necessarily repeal such former provision. *Martindale v. Martindale*, 10 Ind. 566, and cases cited; *Alexander v. The State*, 9 id. 337.

2. We think the act of 1858 never passed both houses of the Legislature, and, consequently, never became operative as a law. This appears by an inspection of the journals of that body, to which the Court has a right to look. See the cases cited in *The State v. Bailey*, 16 Ind. on p. 48; see, also, 2 Ind. p. 558; 8 id. 156.

The act of 1855, providing for adjourned terms, is in full force.

Objection is made to the indictment. It is claimed that it does not charge, in legal form, a public offence. There was no motion below to quash; and some defects in an information or indictment may be waived by a failure to make a motion to quash. We are cited by counsel, on this point, to

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Wharton's Cr. L. p. 863; *Murphy v. The State*, 8 Blackf. 498; *Hare v. The State*, 4 Ind. 241.

We think the indictment sufficient under the code. It shows the death of the assaulted individual. The word murdered, *ex vi termini*, imports death.

Under the code, we can not think it necessary that the indictment for murder by blows, should state the particular part of the body on which the blows fell. Upon the trial of the cause, that fact might be material as one affecting the question of intention in their infliction; that is, if they were upon a vital part, intention to kill might be inferred when it might not be if the blows were upon a part not considered as a vital part of the body.

We admit the common law required the allegation in the indictment. *Dias v. The State*, 7 Blackf. 20. But in Arch. Cr. Pl., (10th ed.) side paging 408, even as to this, it is said that "in this and other instances there is a particularity required in an indictment for murder which it would be ridiculous to attempt to account for or justify, for the same strictness is not required as to the evidence necessary to support it. If, for instance, the wound be stated to be on the left side, and proved to be on the right side, or alleged to be in one part of the body and proved to be in another, the variance is immaterial, and for that reason the objection can now only be taken by demurrer." This shows that even at common law the allegation stood upon the same footing as the allegation as to the hand in which the weapon was held, the depth and size of the wound, &c., all of which are now held not to affect any substantial right of the defendant.

The following cases are cited as sustaining the indictment in the case at bar: *Dukes v. The State*, 11 Ind. 557; *Reed v. The State*, 8 Ind. 200; *Cronkhite v. The State*, 11 Ind. 307; *The State v. Farley*, 14 Ind. 23; *Malone v. The State*, 14 Ind. 220. To which may be added *The State v. Murphy*, 21 Ind. 441.

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It must be at all times remembered that crimes, with us, are all defined by statute, that the words of the statute are to be given their usual meaning in interpreting it; and that the 20th section of the 4th article of the constitution ordains that, "every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms." Interpreting the indictment in the spirit of these rules and provisions, we think it would be understood by a man of common understanding to charge the intentional and unlawful killing of a human being, with premeditated malice.

Per Curiam.—The judgment is affirmed, with costs.

Henry Crawford, for the appellant.

Thomas M. Brown, Prosecuting Attorney, for the appellee.

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194 195

STOCKWELL et al. v. BYRNE et al.

PRACTICE—REPLEVIN—TITLE.—Where, in an action of replevin, the writ is quashed for a defect in the affidavit, and thereupon the cause is dismissed by the plaintiff, the question of title to the property in dispute is not settled.

SAME—REPLEVIN BOND—DAMAGES.—In an action by the obligees against the obligors in a replevin bond, where the title to the property was not determined in the replevin suit, and the title thereto, and the right of possession is in a person, other than the obligees, they are only entitled to nominal damages.

PLEADING—REPLEVIN BOND.—To an action by the obligee, on a replevin bond, where the title to the property in question was not decided in the replevin suit, a plea in bar by the obligor, as to all except nominal damages, of title in himself, is good.

Stockwell et al. v. Byrne et al.

SALE—CONSENT—APPRAISEMENT.—Where part of a judgment is directed to be collected without appraisement, and execution is issued thereon, and property of the judgment defendant levied upon, and such defendant consents that the officer having charge of the writ shall sell such property without appraisement, and the officer does sell the same without appraisement, such defendant is precluded from setting up the invalidity of the sale for that cause; and the purchaser at such sale, in the absence of actual fraud, acquires a good title to the property, as against third persons who are creditors of such defendant.

INSTRUCTIONS TO JURY.—A judgment was rendered by a justice of the peace, by confession, in favor of *A* against *B*, on an account for 78 dollars, and on a bill of exchange for 154 dollars and 12 cents; and in respect to the latter sum was directed to be collected without appraisement. An execution was issued upon the judgment, and property of *B* levied upon to satisfy the same. At the suggestion of the constable, who held the execution, *B* indorsed upon it his consent that the constable should sell under it without appraisement; which was done, and *A* became the purchaser. Afterwards *C* procured a judgment against *B*, before a justice of the peace, had an execution issued thereon, and caused the property thus purchased by *A* to be levied upon by *D*, the constable. *A* replevied the property from *C* and *D*, and on their motion the writ, in the replevin suit, was quashed, because the affidavit did not state the value of the property, and thereupon *A* dismissed the action. *C* and *D* then brought an action against *A*, and his surety *E*, upon the replevin bond. Issues; trial by jury.

- Held*, 1. That the first instruction, asked by the plaintiffs, to the effect "that the sale to *A* was void for want of appraisement," was properly refused, because it ignored an important element that entered into the transaction, viz: the consent of *B* to the sale.
2. That the following instruction was not calculated to mislead the jury: "The question arising upon the first instruction asked by the plaintiffs has been decided upon demurrer, and therefore the question of appraisement, as affecting the validity of the constable's sale, is not before the jury."

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3. That the following, also, though a little obscure, was proper: "Before they (the jury) can find that the judgment, execution and sale thereon in favor of the defendant, *A*, were fraudulent, so as to confer no title upon the purchaser at said sale, they must be satisfied that *A* confederated with *B* to defraud *C*,"—especially as the Court gave in connection therewith another which removed any obscurity therein.
4. That the following, also, is conceded to be correct, as far as it goes: "If the jury believe from the evidence that *B* was justly and honestly indebted to *A*, in the sum for which the judgment was rendered by *S*, (the justice,) he had the right to prefer *A*, by confessing said judgment," was proper, but that if the plaintiffs desired this qualification to be added thereto, "If there are no distinctive badges of fraud to vitiate the transaction," they should have asked it.

APPEAL from the *Vanderburgh* Common Pleas.

WORDEN, J.—Action by the appellants against the appellees upon a replevin bond. Issue, trial, verdict and judgment for the plaintiffs for 1 cent damages. The case was thus:

Byrne had a judgment rendered by a justice of the peace, by confession, against one *Matheny*. This judgment was rendered on an account for 78 dollars, and on a bill of exchange for 154 dollars and 12 cents, and in respect to the latter sum was directed to be collected without appraisement. An execution being issued upon the judgment, property of *Matheny* was levied upon to satisfy the same. At the suggestion of the constable who held the execution, *Matheny* indorsed upon it his consent that the constable should sell under it without appraisement. This was accordingly done and *Byrne* became the purchaser on the constable's sale.

Afterwards *Stockwell* procured a judgment against *Matheny* before a justice of the peace, had an execution issued thereon, and caused the property thus purchased by *Byrne* to be levied upon by *Nelson*, the constable. *Byrne* replevied the property

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from *Stockwell* and *Nelson*, *Keller* being his surety on the replevin bond. On motion of the defendants in the replevin suit, the writ thereon was quashed, because the affidavit did not state the value of the property; thereupon the plaintiffs therein dismissed said action.

The main question in the case before us is whether the foregoing facts are sufficient to defeat the action on the replevin bond or undertaking, except for nominal damages.

It is evident that the replevin suit did not settle any question in respect to the title to the property. It is equally clear that if the title to the property and the right of possession were in *Byrne*, the plaintiffs were entitled to but nominal damages on the replevin undertaking. *Wallace v. Clark*, 7 Blackf. 298. They were entitled to nominal damages because the undertaking was technically broken, in the failure of the plaintiff in the replevin suit to prosecute his action with effect.

We will here notice a question of pleading that arises in the case. The defendants answered by general denial; and secondly, as to all except nominal damages, title to the property in *Byrne* under his aforesaid purchase.

It is claimed, admitting that the title to the property was in *Byrne*, that the pleading was defective as it was not sufficient to bar the entire action, nor any definite part thereof. A party may undoubtedly plead in bar of a part of a cause of action. Where he pleads in bar of the whole, matter which only bars a part, the pleading has been held in numerous cases to be bad; but where he pleads in bar of a definite part, matter which, in law, bars that part, there is no rule either at common law or under the code, that renders such pleading defective. And a plea, as in the case before us, in bar of all but nominal damages, seems to us to be sufficiently explicit as to the amount and part of the cause of action attempted to be answered. This, however, is not an impor-

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tant question in the case, as the defendants were entitled to introduce the evidence under the general denial. *Wallace v. Clark, supra*. We come back to the main question. Did *Byrne* acquire a valid title by his purchase? It is claimed by the appellants that as the property was sold without appraisalment, *Byrne* acquired no title, the sale being void, and that it was rightfully levied upon to satisfy the *Stockwell* judgment.

A part of the debt for which *Byrne* recovered his judgment against *Matheny*, waived appraisalment, the other part did not. Instead of rendering separate judgments, the justice put them into one judgment, and directed that the one part be collected without appraisalment. We shall not inquire whether this judgment authorized the collection of any part thereof without appraisalment. *Matheny* consented that the sale should take place without appraisalment, and he could not be heard to say that the sale was void for the want of appraisalment. The maxim, "that to which a person assents is not esteemed in law to be an injury," is applicable here. *Matheny* having consented that the sale should be made without appraisalment, and thus precluded himself from setting up its invalidity, it is difficult to see on what ground a third person could take advantage of the want of appraisalment, though he be a creditor of *Matheny*, unless indeed the transaction was fraudulent in fact as being intended to cheat, hinder or delay the creditors of *Matheny*.

We are by no means prepared to say that the transaction was fraudulent *per se*. On the contrary we are of opinion, with the Court below, that in the absence of actual fraud, the sale was valid, and a good title passed to *Byrne* under his purchase. Whether or not there was any fraud in fact, was a question which was fully open to the consideration of the jury.

Some further points are made in reference to instructions given and refused. The plaintiffs asked an instruction to the

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effect that the sale to *Byrne* was void for want of appraisement. This the Court very properly refused to give, because it ignored an important element that entered into the transaction, viz: the consent of *Matheny* to the sale; but the Court said to the jury as follows: "The question arising upon the first instruction asked by the plaintiffs has been decided upon demurrer, and therefore the question of appraisement, as affecting the validity of the constable's sale, is not before the jury." It is objected that this instruction took from the consideration of the jury the question of fraud in fact. We think differently. As we have seen, the plaintiffs asked the Court to charge that the sale was void for want of appraisement; thereupon the Court, in seeming explanation of the ground on which the charge was refused, told the jury that the question had been decided by the Court on demurrer, and that the jury, therefore, had nothing to do with it. We do not think the jury could have been misled by the remark of the Court. They could not properly have inferred from it that they were not to consider all questions of fraud in fact, whether arising from the confession of judgment in favor of *Byrne*, the consent of *Matheny* to the sale without appraisement, or otherwise arising in the case.

At the request of the defendants the Court gave the following instruction: "Before they (the jury) can find that the judgment, execution and sale thereon, in favor of the defendant *Byrne*, and against *Matheny*, were fraudulent, so as to confer no title upon the purchaser at said sale, they must be satisfied that *Byrne* confederated with *Matheny* to defraud *Stockwell*."

The objection to this charge is thus stated in the brief of counsel for the appellant: "Confederated implies an active participation, whereas none is necessary. Fraud by *Matheny*, and notice to *Byrne* is all that need be proven to vitiate the sale." This objection, we think, is not well taken. If *Byrne*

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knew of a fraud attempted to be perpetrated by *Matheny*, and purchased the property with such knowledge, he became a partaker of that fraud, and may well be said to have confederated with *Matheny*. Indeed a party who purchases, with a knowledge of fraud on the part of his vendor, actively participates in the fraud. He does that which enables the vendor to perpetrate the fraud. The charge may have been a little obscure to the apprehension of the jury, but if the appellants thought any explanation necessary, they could have asked a further charge on the subject.

The appellants did ask, and the Court gave, the following charge, which removes any obscurity in the above mentioned, viz: "If the jury believe from the evidence that the judgment of *Byrne* against *Matheny* was confessed for the purpose of defrauding the plaintiff, *Stockwell*, or hindering or delaying him in the collection of his debt, and that *Byrne* had notice of such intent, the judgment as against *Stockwell* is void, and the constable's sale on execution issued upon said judgment would confer no title upon *Byrne* as against *Stockwell*."

The Court, at the request of the defendants, gave the following charge: "If the jury believe from the evidence that *Matheny* was justly and honestly indebted to *Byrne* the sum for which the judgment was rendered by *Stinson* (the justice) he had a right to prefer *Byrne* by confessing said judgment." It is admitted that this charge is correct so far as it goes, but it is claimed that the Court should have added, "if there are no distinctive badges of fraud to vitiate the transaction."

If the appellants desired such a qualification, they should have asked it. As it is, the charge is well enough, especially as the Court had already charged that if the judgment was confessed for the purpose of defrauding *Stockwell*, *Byrne* having notice thereof, it was void as against *Stockwell*.

What we have said we believe covers all the questions made in the case, unless it be whether the verdict is sustained by

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the evidence. We can not disturb the verdict of the jury, as it is by no means clear to our minds that there was any fraud in the transaction. For aught that appears, the plaintiffs recovered as much as they were entitled to.

Per Curiam.—The judgment below is affirmed, with costs.

Asa Iglehart, for the appellants.

James E. Blythe, for the appellees.

CRISMAN v. SMITH, Administrator.

WITNESS—STATUTES CONSTRUED.—A defendant who is “sworn at the instance of and examined by the Court,” without the solicitation of the plaintiff, and whose statements have no bearing against him, has no right, by virtue of §§ 295 and 300, 2 G. & H. 188, to insist on testifying fully as to all matters in controversy in the suit.

PRACTICE IN SUPREME COURT.—The finding of the Court below will not be disturbed, by this Court, where the evidence, though circumstantial, tends to sustain it.

SAME.—Where evidence is not objected to in the Court below, it is too late to make the objection in this Court.

APPEAL from the *Fayette* Circuit Court.

HANNA, J.—*Smith*, administrator of *Jacob Crisman*, sued *William Crisman* for money had and received to the use of the deceased. Answer: 1. Denial. 2. As to a part that it was a gift, &c.

It appeared from the evidence of plaintiff and defendant that the defendant and family were living in the house of, and with the deceased, during his last sickness, and at his death; that about that time the defendant collected, on a note due the deceased, the sum of 397 dollars; and sold of

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his cattle, 60 dollars. Whether the note upon which the collection was made, had been given to the defendant, and the money received for the cattle paid over to the deceased, were disputed points in the issues and testimony. After the evidence had been given upon the part of the plaintiff and defendant both, the record states that "the defendant was sworn at the instance and examined by the Court."

We can not see by the record that the plaintiff had anything to do with the introduction of the defendant's testimony, nor do we perceive that the statements made by him would have any bearing against him. If the statements were considered at all by the Court, in the determination of the issues, they were such as would be favorable to the defendant, and the other party is not complaining here of this introduction; for, notwithstanding they were so introduced, the plaintiff had judgment. We do not think this is a case in which the circumstances are such as to have authorized the defendant in insisting, as he did, upon testifying fully as to all matters in controversy, by virtue of §§ 295 and 300, p. 188, 2 G. & H.

We do not think this is a case in which the question whether said sections are still in force, since the adoption of the witness law of 1861, 2 G. & H. 168, properly arises, and we do not, therefore, decide that point.

It is urged that the evidence as to the 60 dollars having been converted by the defendant to his use, was not sufficient. As there was some evidence, circumstantial, it is true, on the point, we will not disturb the finding.

Several witnesses were examined as to the "general reputation of defendant," and testified that it was bad. The defendant does not appear to have asked that the questions should be made more specific; nor to have objected to the introduction of testimony of that character. Appellant now

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assumes that the evidence was introduced for the purpose of impeaching said defendant as a witness.

We are not informed by the record for what purpose the evidence was given. The circumstances detailed by other witnesses made the testimony, if legitimate at all, as effective in an effort to show that the defendant had improperly appropriated the 60 dollars to his own use, as it might have been to impeach.

We are inclined to the opinion that as the evidence was not objected to when offered, such objection now comes too late.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

John S. Reid, for the appellant.

James C. McIntosh, for the appellee.

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JUDGMENT—JURISDICTION.—The judgment of a Court having jurisdiction of the subject matter, and of the persons of the defendants, however irregular, is not void, and can not be impeached collaterally.

SHERIFF'S SALE—APPRAISEMENT.—Where the law requires a sheriff to appraise property taken on execution, a sale without appraisal is a nullity.

SAME—PRESUMPTION.—In the absence of proof on the subject, it will be presumed that the sheriff, in that respect, performed his duty.

APPEAL from the *Pike* Circuit Court.

DAVISON, J.—*Daniel, Benjamin, and John Ashby*, who were

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the plaintiffs, brought an action against *James Evans* for the recovery of a tract of land in *Pike* county. The Court tried the issues, and found for the plaintiffs. New trial refused and judgment, &c.

The following are the facts: In 1839, one *James Ashby* became the owner, in fee, of the land in dispute, and, as such, continued until 1846, when he died, leaving the plaintiffs as his children and heirs. On *March 25th*, 1839, *Hiram* and *Samuel Kenman*, a firm doing business at *Petersburgh, Indiana*, executed to *Todd & Praigg*, of *Louisville, Kentucky*, three promissory notes for the aggregate amount of 519 dollars. Upon these notes, *Todd & Praigg*, on the 24th of *February*, 1841, recovered a judgment in the *Pike Circuit Court*, against the *Kenmans*, for 487 dollars; and *James Ashby*, on the 2d of *March*, 1841, entered himself as replevin bail on that judgment, for the stay of execution for twelve months. In *August*, 1847, a writ of *scire facias* was regularly issued upon said judgment and replevin bail, against the plaintiffs, the then defendants, as heirs, &c., to revive the judgment, and to have execution upon it, and the recognizance of replevin bail against the property which had descended to them from their father, *James Ashby*. And said writ having been duly served upon them, they were, at the *August* term, 1847, of the same Circuit Court, defaulted, and a judgment of revivor and an order for execution was entered against them in the usual form. The plaintiffs—the then defendants—at the time of these proceedings, were minors; but the record fails to show that any guardian, to appear for them, was appointed by the Court. An execution, pursuant to said order, was issued in *September*, 1847, and by virtue of it, the sheriff levied on the lands in controversy, and sold them to *John Praigg*, who, in pursuance of the sale, received a . . . deed. The record is silent as to whether the lands were, prior to the sale, appraised in the mode prescribed by the statute.

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Praigg conveyed them to one *Joseph Davidson*, who conveyed to *John Palmer*, who conveyed to *James Evans*, the defendant. Under his conveyance, the defendant went into possession of the lands, and still continues to occupy the same.

The evidence is upon the record, and, under the assignments of error, the only question to settle is, whether the title derived from the sheriff's sale defeats the plaintiff's claim to the lands? The Circuit judge must have considered that sale a nullity; but the appellees have not favored us with a brief, and hence, we are not advised as to the ground upon which they propose to sustain the finding of the Court. The appellant, however, discusses two points: 1st. Was the judgment on *scire facias* void for want of a guardian, *ad litem*? 2d. Should it appear in the record that the lands, prior to the sheriff's sale, were duly appraised?

The judgment,—the record being silent as to the appointment of such guardian,—would, in a direct proceeding in error, have been held erroneous; but here the Circuit Court had jurisdiction of the subject matter, and of the persons of the defendants. The rule is well settled that the judgment of a Court, having such jurisdiction, “however irregular, is not void, and not impeachable collaterally.” *Homer v. Doe*, 1 Indiana 130 and authorities there cited.

Nor was the sale void for want of appraisement, because it does not appear that there was *no appraisement*. On this point the record is perfectly silent. “If an appraisement of the land was required to give validity to the sheriff's sale, proof that it was appraised was not incumbent on the defendant.” Against the title of the plaintiff, he was only bound to show a judgment, execution, sale, and sheriff's deed. This he has done. It is true, when the law requires a sheriff to appraise property taken on an execution, a sale without appraisement would be a nullity; but, in the absence of any proof on the subject, he will be presumed, in that re-

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spect, to have done his duty. *Mercer v. Doe*, 6 Ind. 80; *Carpenter v. Doe*, 2 Ind. 465; *Doe v. Collins*, 1 Ind. 24; *Duncan v. Duncan*, 3 Iredell 317. We perceive no ground upon which the decision in the Court below can be supported, and the result is, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

W. E. Niblack and *W. H. De Wolfe*, for the appellant.

C. M. Allen, *N. Usher*, and *D. McDonald*, for the appellees.

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WILL—SALE BY TRUSTEE—CURATIVE STATUTE.—In *February*, 1851, *A*, a *feme covert*, made her last will, which contained the following item: "I give and bequeath to my husband, *B*, the house and lot in *Y*, now occupied by us, being the same lot conveyed to me by my mother *C*, late of *Y*, deceased, bearing date *September* 15, 1840, for and during the natural life of said *B*, upon the condition that the said *B*, in a suitable, proper and fatherly manner, provide for, and take care of our unfortunate daughter *D*, during their joint lives. And if in the judgment of the said *B*, at any time after my decease, it shall be necessary to the comfortable support of either the said *B* or *D*, that the aforesaid house and lot be sold, then I do hereby authorize and empower him, the said *B*, to sell and convey the same in fee simple, the same as he would were the same premises bequeathed to him in fee simple by me; and in that case my will is that the avails of the said property sold, be applied in part or in whole, as the circumstances of the said *B* and *D*, or either of them, may require, by the said *B*, to his and her comfortable support, according to his best judgment. In case the said *D* shall survive her father, the said *B*, and the premises described above be

22	18
152	220
22	18
155	140

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unsold, at the time of his death, then I give and bequeath to our daughter *E*, in fee simple, the premises described above, upon the same conditions as above imposed upon my husband, the said *B*, provided that the said *E* shall be in suitable circumstances, and is willing to take upon herself the charge of said *D*. But should the said *E*, then not be in suitable circumstances, or be unwilling to take the care and support of the said *D* upon herself, then I give and bequeath the aforesaid premises to our son *F*, upon the same conditions as aforesaid; and shall he not take upon himself the charges aforesaid, then I give and bequeath the premises to our son *G*, upon the same conditions. And if all these persons shall fail to accept the bequest, and take upon them the charge of said *D*, as aforesaid, then I ordain that the said property shall be applied, under the instructions of the proper legal authority, to the comfortable maintenance and support of the said *D*," &c. *A* died in *March*, 1851. In *June*, 1852, the trust and power created by her said will passed, according to its terms to *F*. On the 16th of *November*, 1852, the said *F* and *D*, being then residents of *I*, the said *F*, for the purpose of carrying out the objects of said trust exchanged said property in *Y* to one *W*, for property in *I*, and took a deed from him for the same in fee, providing therein expressly that the same should be held by said *F*, "under the same restrictions, and subject to the same conditions in reference thereto, as those imposed upon" him by said last will, concerning said trust, which deed was recorded *January* 27, 1853, of all which the defendants below had full notice; and on the 28th of *October*, 1853, the said *F*, conveyed said property in *I* to one *J*, under whom the said defendants hold. In *March*, 1857, said *F*, the trustee under the will of said *A* died; and on the 30th of *July*, 1858, *H*, the plaintiff below, was appointed, by the *M* Court of Common Pleas, successor in the trust to said *F*, deceased. At the *March* term, 1862, said *H* commenced an action in the Court below, to recover possession of the property in *I*, which was taken by *F*, the former trustee, from *W*, in exchange for the property in *Y*, bequeathed in trust for the support of the said *D*. *H* concedes the validity of the exchange between *F* and *W*, admits that the title of the *I*

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property passed to *F*, and puts the case upon the ground that *H* was powerless to afterwards divest himself of it.

QUÆRE.—Whether the will authorized the exchange of the *I* property for real estate situated any where.

Held, that *F* had the power to sell the real estate in *I*, if the exigencies of the trust, created by the will, required a sale; hence *bona fide* purchasers, that is, purchasers, ignorant of the propriety or not, of the sale would hold independent of the curative statute of March 7, 1863. Acts 1863 p. 16.

Held, also, that if *F* acted erroneously, but honestly in making such sale, the curative statute healed up the consequences of such error as to all persons.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—In *February*, 1851, *Caroline Jones*, of *Youngstown, Ohio*, being a *feme covert*, made her last will, which contained the following item:

“I give and bequeath to my husband, *Ira Jones*, the house and lot in *Youngstown*, now occupied by us, being the same lot conveyed to me by my mother, *Lucy Edwards*, late of *Youngstown*, deceased, bearing date *September 15, 1840*, for and during the natural life of said *Ira Jones*, upon the condition that the said *Ira Jones*, in a suitable, proper and fatherly manner, provide for and take care of our unfortunate daughter, *Lucy Jones*, during their joint lives. And if, in the judgment of the said *Ira Jones*, at any time after my decease, it shall be necessary to the comfortable support of either the said *Ira Jones*, or *Lucy Jones*, that the aforesaid house and lot be sold, then I do hereby authorize and empower him, the said *Ira Jones*, to sell and convey the same in fee simple, the same as he would do were the same premises bequeathed to him in fee simple by me; and in that case, my will is that the avails of the said property sold be applied in part, or in whole, as the circumstances of the said *Ira* and *Lucy*, or either of them, may require, by the said *Ira Jones*,

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to his and her comfortable support, according to his best judgment. In case the said *Lucy Jones* shall survive her father, the said *Ira Jones*, and the premises described above be unsold at the time of his death, then I give and bequeath to our daughter, *Cornelia Jones*, in fee simple, the premises described above, upon the same conditions as above imposed upon my husband, the said *Ira Jones*, provided that the said *Cornelia* shall be in suitable circumstances, and is willing to take upon herself the charge of said *Lucy*. But, should the said *Cornelia* then not be in suitable circumstances, or be unwilling to take the care and support of the said *Lucy* upon herself, then I give and bequeath the aforesaid premises to our son, *Albert Jones*, upon the same conditions as aforesaid; and shall he not take upon himself the charges aforesaid, then I give and bequeath the premises to our son, *Ira Jones*, upon the same conditions. And if all these persons shall fail to accept the bequest, and take upon them the charge of said *Lucy* as aforesaid, then I ordain that the said property shall be applied, under the instructions of the proper legal authority, to the comfortable maintenance and support of the said *Lucy Jones*. In case the said *Lucy* shall survive her father, the said *Ira Jones*, and, at the time of his death, the property aforesaid has been sold, then I will and ordain that such portion of the avails of said property, as shall remain unexpended, shall be offered to the aforesaid *Cornelia Jones*, to be faithfully applied by her to the comfortable maintenance and support of the said *Lucy Jones*; and if the said *Cornelia* be not in suitable circumstances to take charge, or declines to accept the property on these conditions, then I ordain that the same tender be made to our son, *Albert Jones*; and if he declines its acceptance and charge, then that it be offered on the same terms to our son, *Ira Jones*; and if all decline the property and charge, then I ordain that the proper legal authority take charge of the property and faithfully apply all

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of it to the comfortable support and maintenance of our said daughter, *Lucy Jones*."

In *March*, 1851, *Cornelia* died. In *June*, 1852, the trust and power created by her said will, passed, according to its terms, to *Albert Jones*. On the 16th of *November*, 1852, the said *Albert* and *Lucy*, being then residents of *Indianapolis*, the said *Albert*, for the purpose of carrying out the objects of said trust, exchanged the *Ohio* property, with one *Warner*, for property in *Indianapolis*, and took a deed from him for the same in fee, providing therein expressly that the same should be held by said *Albert* "under the same restrictions, and subject to the same conditions in reference thereto, as those imposed upon" him by said last will, concerning said trust, which deed was recorded *January* 27, 1853, of all which the defendants had notice; and on the 28th of *October*, 1853, the said *Albert* conveyed said *Indianapolis* property to one *W. H. L. Noble*, under whom the defendants hold; and they have received the profits therefrom to the amount of 1,000 dollars.

In *March*, 1857, said *Albert Jones*, the trustee under *Cornelia's* will, died; and, on the 30th of *July*, 1858, *Virgil J. Huey*, the plaintiff below, was appointed, by the *Marion* Common Pleas, successor in the trust to *Albert Jones*, deceased.

At the *March* term, 1862, said *Huey* commenced an action in the *Marion* Circuit Court, to recover possession of the property in *Indianapolis* which was taken by *Albert Jones*, the former trustee, from *Warner*, in exchange for the property in *Ohio*, bequeathed in trust for the support of *Lucy Jones*. The ground of his action, as presented by his counsel, is want of power in *Albert Jones*, his predecessor in the trust, to sell the *Indianapolis* property. It is claimed that the sale of the *Ohio* property exhausted his power of sale under the will. It might be doubted whether the will authorized the exchange of the *Ohio* property for other real estate situated any where.

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Perhaps it only authorized a sale for "avails" that might, without further sale or exchange, be used for the support of *Lucy*; and were this, in fact, the case, it would follow that no title passed to *Warner* for the *Ohio* property, and that the present plaintiff, as trustee, should have proceeded for that, and not for the *Indianapolis* property, as that would be a matter for the consideration and action of *Warner*. But *Huey's* counsel concede the validity of the exchange between *Jones* and *Warner*, admit that the title of the *Indianapolis* property passed to *Jones*, as trustee, and put their case upon the ground that he was powerless to afterwards divest himself of it. They argue thus:

"It is plain that the will gives no power to sell anything but the *Ohio* property which it devises. The only hint in the will, at any power to sell, is in these words: 'If, in the judgment of said *Ira* at any time after my decease, it shall be necessary to the comfortable support of either the said *Ira Jones* or *Lucy Jones*, that the said house and lot be sold, then I do authorize and empower him to sell and convey the same in fee simple, the same as he would do were the said premises bequeathed to him in fee simple by me; and in that case, my will is that the avails of said property sold be applied, in part or in whole, as the circumstances of the said *Ira* and *Lucy* may require.' Surely, it can not be pretended that, if the sale of this property under this will should happen to be, as it was, for other lands, this provision authorized the sale of these other lands. The other lands are the 'avails' mentioned in the will; and so far from being directed to be sold, they are directed to be 'applied' to *Lucy's* support.

"If, on the face of the will, a doubt remained as to the trust thereby created, attaching on the real estate in controversy, the deed made to *Albert Jones*, under which the appellants claim the said real estate, must remove that doubt. This deed conveys the property to *Albert Jones*, 'under the

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same restrictions, and subject to the same conditions in reference thereto, as those imposed on the said *Albert* 'by the last will and testament of *Conelia Jones*, wife of said *Ira Jones*, of *Youngstown*, *Mahoning* county, *Ohio*, deceased, in the bequest to' said *Albert*, 'of the lot of land forming the consideration of this indenture, and by virtue of which said will and for the purpose of carrying out the objects therein expressed this transfer is made.' The very deed, therefore, under which the appellants claim the land in question, manifestly and expressly fixes said trust on this land. And here it should be observed that *Warner* could not, by his deed, enlarge the trust created by the will. If, therefore, he had intended by his deed to confer on *Albert Jones* the power to sell the land mentioned in the deed, and thereby free it from the trust, he could not have done so. Therefore, if even the language of the deed would bear the construction that the trustee might, by a sale of the land, free it from the trust, such language in the deed would be of no effect."

Taking the position, then, as a starting point in the case, that the act of *Jones* in exchanging the trust property in *Ohio* for the real estate in question, in *Indiana*, was valid, we think he possessed the power of selling this *Indiana* real estate, for the reason that without such power he might not be able to accomplish the purpose of the trust created by the will. What was that trust, and what the power given to execute it? The trust was to provide a "comfortable maintenance and support" to *Lucy Jones* during her life, and the power was to sell said property and apply the avails of it, "in part or in whole," to that purpose, "according to his [said *Albert Jones*'] best judgment." It was not the use of or income from said property, but the whole of it, the "avails" of the sale of it, that he was to apply if necessary. And if the trustee had a right, which is conceded by the appellee, to receive the consideration of the first sale in specific arti-

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cles, the whole of which could not in their given state, be appropriated to her use and support, then he had a right to proceed further, if his best judgment so dictated, and convert those articles, the "avails" of the sale, into that which, in his judgment, could be applied to her support. If he could not do that, then he was empowered by the will to do an act, viz: make a first sale of the property for a consideration that could not be applied to the accomplishment of the trust, which would, in fact, disable him to discharge the very trust created by the will. We can not believe that such should be the construction given to the will.

Another point. An act of the Legislature of *Indiana* took effect on the 7th of *March*, 1863, which provides "that all sales of real estate in this State heretofore made in good faith by trustees, or by domestic or foreign executors, in conformity with the provisions of any deed of trust or will, executed and admitted to probate in this State, or in any other of the *United States*, and for which a full consideration has been paid to the party entitled thereto," are confirmed and made valid, and conveyances made by such trustees to the purchasers are declared to vest in the latter the legal title to the land. Acts 1863, 16.

This was a curative statute; and, if valid, applied to this case, notwithstanding it was enacted *pendente lite*.

Says Chief Justice *Marshall*, in *The United States v. The Schooner Peggy*: "It is in general true that the province of an appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment, and before the decision of the appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no Court which can contest its obligation." 1 Cranch. Rep. 103, S. C.; 1 Cond. Rep. 256.

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See as to curative statutes, *The Board, &c. v. Bright*, 18 Ind. 93, and the cases collected in *Walpole v. Elliott*, *id.* 258.

In this case, then, the trustee had the power, as an abstract proposition, to sell, if the exigencies of the trust required a sale; hence *bona fide* purchasers, that is, purchasers ignorant of propriety or not, of sale, would hold, independent of the curative statute. And, if the trustee acted erroneously, but honestly, in making the sale it would seem that the curative statute healed up the consequences of the error, as to all persons.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

Thos. A. Hendricks, Barbour & Howland, and Newcomb & Tarkington, for the appellants.

W. P. Fishback, and McDonald & Porter, for the appellee.

THAYER v. THE ST. LOUIS, ALTON AND TERRE HAUTE R. R. Co.

RAILROADS—LIABILITY FOR ANIMALS.—By statute, in this State, 1 G. & H. 342, railroad companies are liable for animals, but not persons, injured upon their roads, where they might be, but are not fenced, irrespective of the question of negligence.

SAME.—But where a proper fence is maintained, and in places where it is not required to be, they are not liable for animals injured, except as at common law, where there is negligence on their part, and the negligence of the owner of the stock does not contribute to its immediate injury.

SAME—FOR GOODS.—They are liable, as common carriers, for goods lost or injured; but, by special contract, they may limit this liability.

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SAME—FOR PERSONS NOT PASSENGERS.—They are liable for injuries done to persons, not passengers, when the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute; and this may include wanton injuries by the companies, where there may be negligence on the part of the injured party.

SAME—PASSENGERS—DEGREE OF CARE.—They are liable as public carriers of passengers for injuries resulting from neglect to use the utmost care of cautious persons, unless that liability is restricted by special contract.

SAME—TO EMPLOYEES.—They are not liable to one employee for injuries occasioned by another, where both are engaged in the same undertaking; nor does it make any difference that the injury, in the given case, happens to one employee, by the negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he can not guard.

SAME.—But they may be liable to employees for injuries happening to them through the negligence of the company; which negligence may consist in the employment of incompetent persons in the management of the road and trains, or of unsafe machinery in the running of them, or of using the road when defective, &c., if the injuries actually happen from such causes, and the employees injured have not the same means of knowledge of the existence of such causes as the employer.

APPEAL from the *Vigo Circuit Court*.

PERKINS, J.—*Alfred Thayer* brought an action against the *St. Louis, Alton and Terre Haute Railroad Company*, alleging as his ground of complaint that he was a brakeman upon a freight train owned and run by the company, and that, while acting for the company, he fell through a culvert and received great bodily injury, under the following circumstances, viz: At a point on the road there is a culvert which is now, and has been since the road was constructed, uncovered, but of what dimensions the culvert may be is not stated. Near that

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culvert a switch branches from the road, "over which it frequently becomes necessary for the employees, in charge of trains, to pass while switching the company's cars from the main to the side track." On the passing of a given freight train the conductor ordered said *Thayer* to detach the cars from the engine in order to run them on the switch, and, in obeying said order, without fault on his part, he fell into the culvert.

Thayer claims that the company is guilty of negligence in building and continuing an open culvert; and is liable to him for the injury he received, notwithstanding he entered into the service of the company, with knowledge of the state of the culvert, because the conductor ordered him to detach the cars.

The Court below held the railroad company not liable, under the circumstances.

As a mode of reaching the decision of this cause it may be well to state the principles of railroad law established in *Indiana*, and then to ascertain whether the case at bar falls within any one of them.

1. By statute, in this State, railroad companies are liable for animals, but not persons, injured upon their roads, where they might be, but are not fenced, irrespective of the question of negligence. *The Toledo, &c. Co. v. Thomas*, 18 Ind. 215.

2. Where a proper fence is maintained, and in places where it is not required to be, the companies are not liable for animals injured, except as at common law, where there is negligence on their part and the negligence of the owner of the stock does not contribute to its immediate injury. *Ibid.*

3. Railroad companies are liable, as common carriers, for goods lost or injured. See the cases in *Davis' Dig.*, tit. Carriers. But by special contract, they may limit this liability. *The Indiana Central Railway Co. v. Mundy*, 21 Ind. 48.

4. Railroad companies are liable for injuries done to per-

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sons, not passengers, where the injuries arise from negligence on the part of the companies, to which injuries the negligence of the injured parties does not immediately contribute; and this may include wanton injuries by the companies where there may be negligence on the part of the injured party. *The Evansville, &c. Co. v. Hiatt*, 17 Ind. 102, and cases there cited.

5. Railroad companies are liable as public carriers of passengers for injuries resulting from neglect to use the utmost care of cautious persons; *Gillenwater v. Madison, &c. Co.*, 5 Ind. 339; unless that liability is restricted by special contract. *The Indiana, &c. v. Mundy*, *supra*. As to who is a passenger, see *Fitzpatrick v. The NewAlbany, &c. Co.*, 7 Ind. 486.

6. Railroad companies are not liable to one employee for injuries occasioned by another, where both are engaged in the same undertaking; *Wilson v. The Madison, &c. R. R. Co.*, 18 Ind. 226; nor does it make any difference that the injury, in the given case, happens to one employee, by the negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequence of whose negligence he can not guard. *Ibid*. And see, also, in point, *Sherman v. The Rochester, &c. R. Co.*, 17 (N. Y.) Court of App. 153. As against the public, but not as between fellow-servants, railroad companies are liable for the negligence of servants in their business.

7. But railroad companies may be liable to employees for injuries happening to them through the negligence of the railroad company; which negligence may consist in the employment of incompetent persons in the management of the road and trains, or of unsafe machinery in the running of them, or using the road when defective, &c., if the injuries actually happen from such causes, and the employees injured have not the same means of knowledge of the existence of such causes as the employer. *The Indianapolis, &c. Co. v.*

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Love, 10 Ind. 554; *The Indianapolis, &c. R. Co. v. Klein*, 11 *id.* p. 38. See, also, in point, *Wright v. The New York Cent. R. Co.*, 25 N. Y. Court of App. 562. On these points, railroad companies are subject to the general law governing master and servant.

We may now properly ascertain whether the case at bar falls within any of the foregoing principles.

How, then, came the plaintiff in this suit to be injured? Was it through the negligence of the company in suffering a culvert to remain uncovered? If this act constituted negligence, a point we do not decide, the condition of the culvert was as well known to the plaintiff as to the company, and it does not appear that he had objected to serving the company on account of that condition, nor on account of the fact that his customary duty required him to couple cars near to it.

Was it the negligence of the company that the conductor directed the detaching of cars at that place? It was not. The direction was not given, at that time, pursuant to any special order of the company. The direction was given by the conductor in the discharge of his general duties, and by virtue of his general powers as conductor. He did not assume to direct the manner of executing the act. And if, after he had ordered the cars detached, he did not slacken the speed of the train, or place it in position, as he ought to have done, so that the act of uncoupling could be safely performed, then the injury to the plaintiff happened through the carelessness of a co-employee of higher authority, and does not differ from *Wilson v. The Madison, &c. Co.*, *supra*.

Per Curiam.—The judgment below is affirmed, with costs. J. A. Pierce, J. M. Allen and J. T. Scott, for the appellant. Smith & Meek, for the appellee.

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NEW TRIAL—DIVORCE.—*A* sued for and obtained a divorce from his wife, *B*, for reasons alleged, and held by the Court to be sufficient, and asked that certain property might be set off to her, which the Court consented to and did order. Afterwards, at the same term at which the divorce was granted, and the order made, he moved the Court for a new trial, for other reasons of which he was not cognizant when the decree and order were made, and which would have enabled him, if known and disclosed, to have obtained the divorce without letting her have the property.

Held, that, under the circumstances of the case, the motion for a new trial was correctly overruled.

APPEAL from the *Wayne Common Pleas*.

HANNA, J.—In *April*, 1862, *Isaac Rindge*, the appellant, sued for a divorce from his wife *Matilda*; alleging that they had been married for over twenty years; “that for two or three years last past she had regarded him with hatred and aversion; that she has during that time been ill-tempered and quarrelsome, and that she is and has been for many years in the habit of constantly using profane language; that she, some two months ago, declared that she was determined to separate from the plaintiff and her children, and refused to listen to his remonstrances against such a course of conduct, but declared that she had been for years resolved and would delay that step no longer; that she did thereafter, to-wit, in *April*, abandon her house and declared that she never would return.” The plaintiff further averred that such abandonment was utterly without cause, but that because of incompatibility of temper and disposition they could not again live together; that finding she was determined to leave him, and being unwilling to see her depart, without any means of support, he had given her certain personal property, and made a deed to certain real estate described in an agreement, made

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between the parties, which is set forth; and prayed that the Court in its decree would adjudge that said real estate be taken and held as the property of said *Matilda*.

In answer, she filed the general denial. The Court, upon the hearing, decreed a divorce, and that the property named should be held, &c., by her. The decree was entered on the third day of the *May* term, to-wit: on the 14th day of *May*, 1862. Afterwards, on the 23d day of said term, to-wit: on the 6th day of *June*, the parties again appeared, and the plaintiff made a motion for a new trial, and filed reasons therefor, as follows:

1. Said plaintiff was induced to consent to and procure said decree by the fraud and deceit of said defendant, as shown by the affidavit of the plaintiff and of *Edwin R. Kirk*, filed herewith.

2. Said judgment was obtained through accident and surprise of the plaintiff, as shown by the said affidavits herewith filed.

3. Said plaintiff has discovered new and material evidence for him, which he could not, &c.

And the plaintiff specially moves the Court to set aside that part of said judgment which makes provision as to the property of the plaintiff, and for a new trial as to it, for the reasons Nos. 2 and 3 aforesaid, and also for the reason that said agreement and deed, and said order of the Court, were procured by the fraud and deceit of the defendant, as shown by the affidavits filed.

The affidavit of the plaintiff professes to set forth the circumstances which controlled his action, in applying for the divorce, to-wit: That, prior to the 29th of *March*, 1862, he and his wife had lived as amicably together as her unhappy temper would permit, and he had no thought of seeking a divorce; that on that day, she, for the first time, informed him that she designed leaving him, and wished him to consent

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that a divorce might be granted; that he tried to change her determination, but she became violent and apparently much deranged in body and mind, and produced the impression on his mind that she was insane, and threatened to destroy her life unless he would consent to a divorce, and convey to her certain property; that believing she would do violence to herself unless he would accede he did consent, and entered into the within agreement, produced on the trial for a divorce, as to the disposition of the property, &c., which was entered into solely to prevent the suicide threatened, and under the belief that she had always been true to him; that pursuant to said agreement she was about to apply for a divorce, but was advised by her counsel that she had no grounds to proceed; he then, at her solicitation, made the application and obtained the decree herein; and on the faith of her acts and representations aforesaid, delivered the personal property and deed in the agreement named; that after said decree he discovered for the first time that her partial insanity was feigned, for the fraudulent purpose of obtaining the property and his consent to a divorce, and that she had on the 24th day of *November*, 1861, and on divers other days and times since, been guilty of adultery with one *Edwin R. Kirk*, which facts he did not know, and could not have sooner discovered with reasonable diligence; that if he had known said facts he would not have consented to said decree, &c.; that upon another trial he will prove her fraud and adultery; that they both remain unmarried, and have no marriage contract.

The affidavit of said *Kirk* was filed, in which he deposed to said adulterous intercourse, at divers time, at the house of said plaintiff, at the "instance of said *Matilda*."

The Court overruled the motion for a new trial.

The only question in this case is whether that ruling was correct.

It was intimated in *Wooley v. Wooley*, 12 Ind. 663, that un-
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der our code of procedure the statutory modes pointed out had superseded, where they differed from the old chancery practice in reference to obtaining relief from judgments, &c. In *McQuig v. McQuig*, 18 Ind. 294, the same doctrine is more positively asserted; and that the portion of the statute regulating applications for new trials should govern proceedings for relief from judgments obtained by fraud. If this is the correct view of our present practice, under the code, it follows that the application is in the proper form, in the case at bar, the substance of the ground for a new trial, as presented, being fraud upon the part of the adverse party in procuring the consent of the plaintiff to the rendition of the judgment. The only question then is, whether the facts presented make a case in which the applicant is entitled to the relief prayed. Our statutes have been considered very liberal on the subject of severing the marriage ties; and yet we believe a proper construction thereof would exclude a woman, unless under peculiar circumstances, from a right to alimony, in an instance in which her husband might obtain a divorce because of her adultery. In the case at bar the husband obtained a divorce, whether rightfully or not we are not called upon to say, upon grounds other than adultery of the wife.

The statute is that "the Court shall make such decree for alimony in all cases contemplated by this act as the circumstances of the case shall render just and proper." Sec. 19, 2 G. & H. 353; acts 1859, p. 109. Whether the Court, upon the case made, would have decreed any alimony, and if so how much, we can not say; because the record shows that the decree conformed to, and was in accordance with, the agreement of the parties. Should the Court have granted a new trial to the husband, the plaintiff and prevailing party, because of the alleged fraudulent conduct of the wife? We are of opinion that the Court decided correctly in refusing a new trial. It is evident that the separation and application

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for the divorce were the result of previous agreement of the parties; whether the action of the Court in giving judicial sanction to such an agreement was in strict accordance with our views of correct judicial proceedings, is a point we are not called upon to decide. All we do decide is that, under the circumstances disclosed, the plaintiff does not, in our opinion, stand in a position to obtain relief from a judgment thus rendered. He obtained a divorce from his wife for reasons alleged and held by the Court to be sufficient and in his complaint asked that certain property might be set off to her, which the Court consented to order. He now says there were other reasons, of which he was not cognizant, which would have enabled him, if known and disclosed, to have obtained the divorce without letting her have the property. As the record stands, the divorce was granted for her fault, and as before stated, we do not know whether the Court, in the absence of the agreement, would have given alimony or not. As the plaintiff voluntarily agreed, notwithstanding that, to suffer the decree for the property to go against him, we think the Court did right to refuse a new trial and to wash its hands of the whole transaction as quickly as possible.

Per Curiam.—The judgment is affirmed, with costs.

Bickle & Burchenal, for the appellant.

J. B. Julian and Holland & Kibby, for the appellee.

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CASES ADHERED TO.—*Wooley v. Wooley*, 12 Ind. 663, and *McQuig v. McQuig*, 13 *id.* 294.

APPEAL from the Wayne Common Pleas.

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HANNA, J.—In this case the same facts, shown upon the application for a new trial in the preceding case, are set forth in the form of a complaint to obtain relief from the judgment of the Common Pleas. A demurrer was sustained to the complaint. If the cases of *Wooley v. Wooley*, and *McQuig v. McQuig*, in this Court, enunciate correct expositions of the law, this ruling should be sustained. This accords with the doctrines of the preceding case.

Per Curiam.—The judgment is affirmed, with costs.

Bickle & Burchenal, for the appellant.

J. B. Julian and Holland & Kibby, for the appellee.

 BUSKIRK v. KAHN *et al.*

APPEAL from the *Monroe* Circuit Court.

Per Curiam.—Action by the appellees against the appellant upon two promissory notes. Judgment for the plaintiff.

There is no error in the judgment below.

The judgment is affirmed, with costs and 6 per cent. damages.

J. E. McDonald and A. L. Roache, for the appellant.

Newcomb & Tarkington, for the appellees.

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DEED—DELIVERY OF—ONUS PROBANDI.—The possession of a deed is *prima facie* evidence that it has been legally delivered, and the

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onus of proving the contrary devolves on the person who seeks to set it aside.

SAME—WHAT CONSTITUTES A DELIVERY.—To constitute a delivery of a deed there must be an intention to part with the control over it as its owner.

SAME—ESCROW.—Where a deed is delivered to a third person to hold for the parties, until the happening of a given event, it is called an *escrow*, and a delivery, by such person, to the grantee named in the deed, before the happening of the event, vests no title in him, and he can convey none.

SPECIAL AGENT—POWER.—A party who deals with one who is a special agent to perform a particular act, is bound to ascertain his power, and the act of such agent beyond his power, does not bind his principal.

ESTOPPEL—BONA FIDE PURCHASERS.—A man may be estopped by his acts from asserting title to land which he has not conveyed, as against a *bona fide* purchaser of such land, but for facts sufficient to constitute such estoppel, see opinion.

DELIVERY—TITLE.—Where a party delivers a deed, or property to another, with intent to convey to him, the title passes, even though the intention was raised by fraud or false pretences, but such title is voidable on account of the fraud, &c., though if such title is conveyed to a *bona fide* purchaser before avoidance, it becomes in him a complete and absolute title. But where no title passes, the pretended purchaser can have none to convey, and there being no estoppel intervening, the original owner may reclaim.

ESCROW.—For a statement when, and the cases in which the question of the delivery of an instrument in writing as an *escrow*, or otherwise, arises, see the latter part of the opinion in this case.

APPEAL from the *Shelby* Circuit Court.

PERKINS, J.—*Jeremy H. Anderson* subscribed for stock in the *Cincinnati and Chicago Short Line Railroad Company*. The stock was to be paid for in real estate. On the 21st day of *April*, 1851, he signed and acknowledged a deed for a certain tract of land, which the company were to take in pay-

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ment for the stock subscribed. He deposited the deed with *Joel H. Cortmel*, making to him at the time this statement, viz: that *Mr. C. F. Clarkson*, the agent of the railroad company, would call on him in a short time, and would deliver to him a certificate for 1,000 dollars of the stock of said company, and that upon such delivery of the certificate for stock, he should deliver to *Clarkson*, for the company, the deed above mentioned.

Clarkson called, as *Anderson* had stated he would do, but did not have with him any certificate of stock. He requested, however, that *Cortmel* would place in his hands the deed from *Anderson* to the company, so that it might be submitted, for examination, to the attorney of the railroad company. *Cortmel* placed it in his hands for that purpose; the deed has never been returned to *Anderson*, nor has any stock in the company ever been furnished him; but the company conveyed the land described in *Anderson's* deed to *George Berry*. *Anderson* has remained in possession of the land, and still is in possession, and he brings this suit to have his deed to the company, and that of the company to *Berry*, set aside as void. He succeeded below.

Three questions are made in the case:

1. Was there a delivery of the deed from *Anderson* to the railroad company?

2. If not, was there any estoppel in *pais*, as against *Anderson*, by lapse of time before seeking to avoid the conveyance, or by acts of acquiescence on the part of *Anderson*?

3. If neither of the above questions can be answered affirmatively, did the conveyance of the land to a third person, conceded to be a *bona fide* purchaser, *George Berry*, put it beyond the power of *Anderson* to reclaim?

1. The possession of the deed by the railroad company was *prima facie* evidence that it had been legally delivered, and threw the *onus* of proving the contrary on *Anderson*. Chit.

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on Cont. p. 3, 7th ed.; *The City of Aurora v. Cobb et al.*, 21 Ind. p. 492. Delivery of deeds is of two kinds, absolute and conditional. 2 Black. Comm. 307. An absolute delivery may be made to the grantee, or to a third person for him. *Stewart v. Weed*, 11 Ind. 92. A conditional delivery can not be made to the grantee; because the law implies an absolute conveyance of the land, by the delivery of the deed to the grantee, and parol evidence can not be heard to defeat the conveyance. Smith on Cont., by Rawle, p. 11 and notes. The condition in case of such delivery, must be written in the deed, or upon it. *Worrell v. Munn*, 1 Seld. (N. Y.) Rep. p. 229; *Braman v. Bingham*, 26 (N. Y.) Rep. 488.

But it is not to be supposed that every act of placing a deed in the hands of the grantee named therein is a delivery, either absolute or conditional; as if the grantor place the deed in the hands of such grantee to inspect, or to hand to another person to inspect, this is no delivery, and operates in no manner as a conveyance. *Rhodes v. School District*, 80 Maine 110; *Graves v. Dudley*, 20 N. Y. Rep. 76.

To constitute a delivery there must be *intention* to part with control over the deed as its owner. *Dearmond v. Dearmond*, 10 Ind. 191; *Stewart v. Weed*, *supra*; Walker's Am. Law, p. 368. In the case at bar, the delivery of the deed by *Anderson* to *Cortmel*, was conditional; the deed was delivered as an *escrow*, that is, as a simple writing, till it was a second time delivered by the agent to the grantee, on the happening of the contingency upon which such second and absolute delivery was to take place. The statement of the manner of the delivery by *Anderson* to *Cortmel*, in the opening of this opinion, shows a delivery as an *escrow*. At an early day the common law required an apt and proper form of words to evidence a delivery as an *escrow*; *The Executors of Shoenberger v. Hackman*, 37 Penn. St. Rep. p. 87; but now, any evidence from which the intention appears to make the delivery such,

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suffices. 2 Black. Comm., Shars. ed. 307, notes. The deed, then, having been in the possession of *Cortmel*, a stranger to it, as an *escrow*, required a further legal delivery from him to the grantee, to make that complete absolute delivery necessary to convey title. He could not give to the deed the force of a conveyance by delivering it in disregard of the restrictions under which he held it, especially in this case where the grantee received the deed with full knowledge of all the facts. *Peter v. Wright*, 6 Ind. 183; *Blight v. Schenck*, 10 Penn. St. Rep. 285. But we do not regard it as a question of good faith, or actual knowledge or otherwise, but as one of power. *Cortmel* was a special agent to perform a single act, and the railroad company were bound to ascertain his power; and the act of such an agent, beyond his power, does not bind his principal. Story on Agency, §§ 133, 224.

We come to the conclusion, then, that there was no delivery of the deed in this case, for two reasons :

1. *Cortmel*, the third person in whose hands it was placed as an *escrow*, did not, in fact, deliver it as a deed. And,

2. He had no power to do so, had he attempted to make such delivery, the event not having transpired upon which he was authorized to make it.

No delivery having been made then, the deed was never executed to the railroad company; for delivery is a material part of the execution of a written instrument; and, the deed not having been executed, no title passed, for title to land is conveyed by executed deeds.

It follows necessarily that, the railroad company, having acquired no title, had none to convey to *Berry*, and that, hence, he has none. *Vail v. McKernan*, 21 Ind. 421.

2. But a man may be estopped by his acts to assert title to land which he has not conveyed, as against a *bona fide* purchaser of such land. *Gatling v. Rodman*, 6 Ind. 289; *Barnes v. McKay*, 7 Ind. 301. We do not think the facts in this case

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constitute an equitable estoppel. We will not extend this opinion by setting them out; but content ourselves with saying that they present almost an exact parallel with those in *Smith et al. v. South Royalton Bank*, 32 Vermont Rep. 341, to which we refer, and which facts were there held to be no estoppel.

3. Does the mere fact that the land has been conveyed by the railroad company to a *bona fide* purchaser, preclude the prior owner from asserting his title?

As we have said, the railroad company not having any title, conveyed none to *Berry*. And again, the title never having passed from *Anderson*, would seem on principle, and as a fact, necessarily to be in him and to be available to him, there being no estoppel in *pais*; and that it is so, is decided in *Smith et al. v. South Royalton Bank*, *supra*, a very carefully considered case. There is a *dictum* in *Blight v. Schenck*, *supra*, that contains an intimation the other way; but in the case in *Vermont* the precise point is fully considered, the authorities upon it collected, and a decision upon it made. The rule is this: Where a party delivers a deed or property to another with intent to convey to him, the title passes, even though the intent was raised by fraud or false pretenses; but such title is voidable on account of the fraud, &c., though if such voidable title is conveyed to a *bona fide* purchaser, before avoidance, it becomes in him a complete or absolute title. *Bell v. Cafferty*, 21 Ind. 411.

But where no title passes, the pretended purchaser can have none to convey, and, there being no estoppel intervening, the original owner may reclaim. *Vail v. McKernan*, *supra*.

In the case at bar, as we have seen, there was no delivery with intent to convey. See 2 Washburn on Real Prop. 585; Add. on Cont. 7; 4th Cruise Dig. (Greenl. ed.) p. 45, *et seq.*; 4th Kent, 10th ed., top p. 544, and notes.

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The question of delivery as an *escrow*, or otherwise, arises properly only between grantor and grantee, obligor and obligee, payor and payee, regarding all those of one character upon the instrument as one party, and those of the other character as the other party; and the doctrines springing out of the question are applied to instruments completed ready for delivery to the party to whom they are to be executed, but of which the delivery, as deeds, is to be withheld, till the happening of some contingency, till which time they are delivered to a third person, as scrolls or writings, to be by him delivered as deeds or operative instruments, on the happening of the contingency. As to this class of writings, the law is definitely settled.

But there is another class of cases, not properly involving doctrines touching the delivery of *escrows*, into which, however, the language of the cases relative to such delivery has been introduced, where the law is not so well settled. The class of cases to which we refer consists of those wherein the several persons composing the party of obligors have arrangements among themselves, or some of them, that the instrument shall not be delivered to the other party—the obligee—till the instrument is completed according to arrangements among themselves, all being of one party, obligors. But the question arising in these cases more properly is, when can the obligors defend against an instrument delivered to the obligee by some of the obligors without the consent of others, before it was perfected according to agreement among themselves? Defend because the instrument delivered was an imperfect one? And these cases may divide themselves into four classes:

1. Those where the instrument delivered is commercial paper.
2. Where the instrument delivered is not commercial pa-

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per, but something appears upon its face indicating that the instrument is incomplete.

3. Where the instrument is not commercial paper, and nothing appears upon its face indicating that it is not complete.

4. Where independent of appearance and character of the instrument, the obligee takes it with knowledge, &c.

These questions do not arise in this case.

Per Curiam.—The judgment below is affirmed, with costs.

L. Barbour and *J. D. Howland*, for the appellant.

Thos. A. Hendricks and *Oscar B. Hord*, for the appellee.

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REPLEVIN BAIL—RETAINER.—A replevin bail for the stay of execution, who has paid a part of the judgment, and afterwards at a sale of the property of his principal, by the sheriff, on an execution issued thereon, becomes the purchaser thereof, for a sum greater than the balance due, has the right, against junior creditors in whose favor executions are, at the time, in the hands of such sheriff, to retain the overplus to an amount sufficient to satisfy the sum paid by him as such bail.

APPEAL from the *Boone* Common Pleas.

HANNA, J.—On the 7th of *May*, 1861, *Gano* and others recovered a judgment and foreclosed a mortgage for 906 dollars and 3 cents, without valuation, against *Elihu Cox*, in the Common Pleas Court of said county.

On the 17th of the same month *Robert Cox* became replevin bail for the stay of execution for the time fixed by law.

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On the 7th of *November*, 1861, said bail paid into the clerk's office on said judgment 650 dollars. On the day last aforesaid a copy of said judgment and decree was issued and placed in the hands of the appellant, as sheriff, &c. On the 14th of *December*, 1861, said property was sold by said sheriff on said decree to said *Robert Cox* on a bid of 600 dollars; and, on the same day he made a certificate of purchase and a deed, and tendered them to said *Cox* and demanded the amount so bid; but said *Cox* refused to pay any more than the balance due on said *Gano* judgment; claiming to retain the residue because of his rights as replevin bail, and under a mortgage, &c., held by him on said property so bid off. The sheriff refused to allow the said claim, for the reason that he held other executions in his hands against said *Elihu Cox*, upon which he considered it his duty to apply the overplus.

The mortgage relied upon by *Robert Cox* was made by *Elihu* to him on the 9th of *January*, 1861, and was for 2200 dollars, and was foreclosed at the *March* term, 1862, &c.

On the 3d day of *September*, 1861, *Neave* and others recovered a judgment in the said Court against said *Elihu Cox* for 97 dollars and 43 cents, on which execution issued, &c., on the 2d day of *October*, 1861, and was in the sheriff's hands. On the 24th day of *September*, 1861, *Sims* and others recovered a judgment against said *Elihu* in said Court for 156 dollars and 45 cents, on which execution issued *December* 5, 1861, &c.

As *Cox*, the purchaser at sheriff's sale, refused to pay, this was a proceeding by way of motion in Court, under the statute, &c., against him. In the said written motion, the answer and the reply, the facts above set forth appear, as well as the fact that said property was worth 2000 dollars, and that said *Elihu Cox* was insolvent; that *Cox*, the purchaser, paid the balance of the *Gano* judgment to the attorney.

Neither party seeks to set aside the sale so made by the sheriff. The question is as to the application of the over-

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plus, after paying the *Gano* judgment, which, it is conceded, was on a mortgage older than the other liens—though the date thereof does not appear in this record.

By the statute a replevin bail, in an instance when he pays the judgment, can have execution on the same, for his benefit, against the principal. 2 G. & H. 309.

If this statute alone, or in connection with the general principles governing such a case, gives the bail the benefit of the lien of the judgment, as against the property of the judgment debtor, as it existed before the creditor received the amount due thereon, then, it would seem, that junior incumbrances could not intervene to deprive him of the benefit thereof. When a replevin bail pays the judgment to the creditor and is entitled, thus, to an execution for his benefit, against the principal, the question is whether such judgment is a lien upon the property of such principal, and, if so, at what time does it attach. From the perfecting of the judgment it is a lien in favor of the creditor, but is it a lien in favor of the replevin bail, and if yea, is it from the time he becomes such, or from the time he makes the payment, or after he pays is there some kind of relation back to the time he became bound? The statute is, that if such surety pays or is compelled to pay the judgment, or any part thereof, "the judgment shall not be discharged by such payment, but shall remain in force for the use of such bail making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use."

It has been held that the act of becoming replevin bail does not create or constitute a new and substantive contract between such surety and the judgment creditor, so that the valuation laws of that date should govern the execution thereon, but that the law of the original contract controlled.

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Hutchins v. Hanna, 8 Ind. 584; *Doe v. Harter*, 2 *id.* 252; *Doe v. Dutton*, *id.* 309.

It appears to us the principle involved in these cases is decisive of this; for if, by the act of staying, for a time, execution on a judgment the surety becomes for some, perhaps, not clearly defined reason, bound by the terms of the original contract, so far as the remedy thereon is concerned, rather than by the law of the remedy in regard to contracts, at the date at which he becomes a party; then we can not see why, under this broad statute, he should not have the benefit of the like remedy. The judgment, notwithstanding payment to the creditor, remains "in force" and "shall not be discharged;" against whom shall it thus operate? It must be against the principal debtor, and that the surety is subrogated to the rights of the creditor. By this process the liens of intervening creditors would be postponed. That is, a judgment junior to the one thus stayed, although entered at a date anterior to the time when the older judgment was stayed might be thus postponed for the rights of the bail upon said elder judgment. If this is the fair construction of this statute, and, in view of previous decisions, we suppose it is, we do not see that it could work any hardship to a junior incumbrancer. The senior judgment would be a superior lien upon the debtor's property—would have to be first satisfied. The fact that the day of such satisfaction, from such property, should be delayed by staying the execution, can not, in view of numerous decisions relative to the laws controlling the remedy, substantially affect the rights of any creditor. Then if the judgment is not paid the property is swept off from the junior creditors to satisfy the same; if the bail pays it and the property goes for his benefit it is at last but in discharge of that superior lien, to which, under this construction, such bail had a right to look when he became a party.

As the judgment upon the pleadings was in favor of the

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defendant, the replevin bail who bid off the land, we can not disturb it.

Per Curiam.—The judgment is affirmed, with costs.

L. C. Dougherty, for the appellant.

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DEMAND—WIDOW.—A demand, by a widow, on the administrator of her deceased husband, for the 300 dollars worth of personal property allowed her by statute, 2 G. & H. 295, § 21, if made in these words: "Squire, I have concluded to take my 300 dollars in property," is sufficient.

SAME—REFUSAL.—Where an administrator refuses to deliver such property, on request, it is not necessary for the widow to make a specific selection of the articles she desires to take.

STATUTES CONSTRUED.—There is no conflict between § 21, 1 G. & H. 295, and § 43, 2 *id.* 495. The former gives to the widow the right to 300 dollars worth of the personal property of her deceased husband, at any time before the sale thereof, and if she does not take the same, then, to 300 dollars, out of the proceeds of such sale, but does not specially provide that she may receive the same before the return of the inventory, nor point out the duty of the administrator in that behalf; and the latter provides that she shall be entitled to select, and take it before the return of the inventory, and defines the duty of the administrator in that respect.

INSTRUCTIONS TO JURY.—A party has no right to complain of an instruction given the jury, which works no injury.

APPEAL from the *Parke* Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellants, upon an administration bond.

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Edna Reddish was the widow of *Ransom Reddish*, she having survived him. *Hamilton* was the administrator of *Ransom Reddish*, and *Steele* was his surety. *Ransom Reddish* died leaving property to the amount, at its appraised value, of 2000 dollars, and his widow demanded of the administrator the right of selecting 300 dollars worth of such property. The administrator refusing to permit the widow to make such selection; this suit was brought; judgment for the plaintiff.

There is no question raised in the case except upon the sufficiency of the evidence, and the correctness of certain instructions.

The evidence clearly enough made out the plaintiff's case. It was proven that after the property had been appraised and before the sale thereof, *Edna*, the plaintiff's intestate, made a demand of the property upon the administrator, saying: "Squire, I have concluded to take my 300 dollars in property." To which he replied: "Madam, my hands are tied; an injunction is laid on me not to deliver it, and I can not do it."

We may remark that there is nothing in the case showing that the administrator was in any manner enjoined from delivering the property, nor is any reason shown why he should not have delivered it. We, therefore, suppose he meant, by saying that an injunction was laid on him, that other parties interested in the estate had requested or notified him not to make such delivery. But, however that may be, we think there was a sufficient demand, and an absolute refusal to deliver the property. The reason assigned for the refusal is not very material, inasmuch as no valid reason was shown to exist. And it may be further observed that as the administrator refused to deliver the property, there was no necessity for the widow to make a specific selection of such articles as she might choose to take. While he refused to let her have

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any thing, no rule of law would require her to specify any particular thing.

But it is claimed that as it does not appear that the demand was made before the return of the inventory, the widow was not entitled to make a selection of property at all, or have any delivered to her.

We have two statutory provisions that bear upon this question. The first is as follows: "In all cases other than those provided for in the two preceding sections, a surviving wife shall be entitled, before any distribution, to 300 dollars of personal property of her deceased husband, to be selected by her at its appraised value; or, if said property shall have been sold, then to 300 dollars out of the proceeds thereof, for which she shall not be required to account." 1 G. & H. 295, § 21. This section very clearly contemplates that the widow may make the selection at any time before the property shall have been sold, and if she fails to make a selection or claim any property before the sale, she is entitled to 300 dollars out of the proceeds. The other provision is as follows: "The widow, at any time before the return of such inventory, may select and take articles therein appraised, not exceeding in value 300 dollars, for which she shall receipt to such executor or administrator; a statement of the kind and amount of which goods so taken by the widow shall be returned by such executor or administrator, with, and designated on, such inventory." 2 G. & H. 495, § 43.

Now as the statute last above quoted was approved subsequently to the other, it is claimed that it so modifies the other as to limit the right of a widow, and require her to make her selection before the inventory is returned by the administrator. In this construction we do not concur. The two statutes may well be construed together so as to give effect to each. The former statute is not repealed unless it be by implication. But implied repeals are not favored, and in this

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case there is no such inconsistency as requires that the former should be deemed repealed by the latter statute. If the latter statute repeals the former in respect to the right of the widow to take the property before a sale thereof, it is difficult to see why it does not repeal it in respect to her right to the money where the property has been sold. The latter statute makes no provision that she may have the proceeds where the property has been sold.

The construction we give these statutes is this: We have seen that under the former statute the widow had a right to receive the property up to the time of its sale, and after that to the proceeds thereof; but it was not therein specially provided that she might receive the property before the inventory was returned, nor was the duty of the administrator in that behalf pointed out. Hence it was provided in the latter statute that she should be entitled to the property before the return of the inventory, and the duty of the administrator in that respect was defined; but the latter statute in no wise conflicts with the former in giving her a right to the property up to the time of the sale, and if not claimed, then a right to the proceeds.

Another question is made. The Court instructed the jury that the measure of damages was the amount of the value of the property to which the widow was entitled, with interest, &c. The plaintiff recovered the 300 dollars without interest. The appellants have no ground to complain of the amount of the recovery.

Per Curiam.—The judgment below is affirmed, with costs and 1 per cent. damages.

S. F. & D. H. Maxwell, for the appellants.

J. E. McDonald and *A. L. Roache*, for the appellee.

Love v. Oldham.

LOVE v. OLDHAM.

RESCISSION OF CONTRACT—FRAUD.—If a purchaser of property desires to rescind a contract for fraud, practiced by the seller, he must show a return of the property, or an offer to return it, or that it was of no value whatever.

SAME—BREACH OF WARRANTY.—But a rescission of the contract is not the only remedy of such purchaser. If fraud has been practiced, or there has been a breach of warranty, he may stand to the bargain and recover damages for the fraud, or he may rescind the contract and return the thing bought, and receive back what he paid or sold.

SAME—PLEADING.—A purchaser of property may set up fraud, or breach of warranty, as a defence to an action against him for the purchase money, and if the injury sustained is equal or greater than the amount of the purchase money, unpaid, he may defeat the action entirely; if the injury is less it will go in reduction of the plaintiff's claim.

SAME—COUNTER CLAIM.—Under the code, a defendant may set up fraud or breach of warranty, by way of counter claim, and not only defeat the action, but recover against the plaintiff any damage greater than the plaintiff's claim.

APPEAL from the *Decatur* Common Pleas.

WORDEN, J.—Action by *Love* against the appellee on a promissory note. Judgment for the defendant below.

The appellant and the appellee each owned a jackass. The parties exchanged these animals with each other, and *Oldham* was to give *Love* 400 dollars for the supposed difference in their value. Accordingly *Oldham* executed to *Love* four several promissory notes, each for the sum of 100 dollars. On one of these notes this suit was brought. *Oldham* answered in three paragraphs, alleging, in substance :

1. A warranty and false representations on the part of *Love* as to the quality and capacity of the jack traded by him to

Love v. Oldham.

the defendant, and a breach of the warranty and the falsity of the representations.

2. By way of counter claim, a warranty and false representations, claiming damages in the sum of 500 dollars.

3. Fraud in making false representations, &c.

Each of these paragraphs was demurred to, but the demurrer was overruled and exception taken. The ground of demurrer to each paragraph was that it did not state facts sufficient, &c. Replication in denial; trial, verdict and judgment for the defendant for the sum of 100 dollars.

The evidence is not set out, nor is any question made here except as to the ruling on the demurrer to the several paragraphs of the answer.

The objection to the answer is thus stated in the appellant's brief: "The averment is that the animal was represented to be of value for certain specified purposes, and that he was not good for those purposes; and does not show a return of the property, or an offer to return it; or that it was wholly without value, and the pleadings are therefore defective." The following authorities are cited in support of the position: *Wynne v. Hiday*, 2 Blackf. 123; *Howard v. Cadwalader*, 5 Blackf. 225; *Garrett v. Heaston*, *id.* 349; *Mulliken v. Latchen*, 7 Blackf. 136; *id.* 501; *Hardesty v. Smith*, 3 Ind. 39; *Cooley v. Hampsen*, 4 Ind. 455; *id.* 378; 6 Ind. 26.

We think it clear enough that where there has been a fraud practiced upon a purchaser of property, if he would rescind the contract on that ground he must show a return of the property, or an offer to return it, or that it was of no value whatever, in order that the other party may be placed in *statu quo*. But where there has been such fraud practiced, or where there has been a breach of warranty, a rescission of the contract is not the only remedy of the purchaser. "A party defrauded in a contract has his choice of remedies. He may stand to the bargain and recover damages for the fraud, or

Hauck v. Grantham.

he may rescind the contract, and return the thing bought and receive back what he paid or sold." 2 Kent Com., 10th ed., p. 664, note a; *vide*, also, notes to *Chandler v. Lopus*, 1st. Smith's Lead. Ca., 8d ed., top pp. 189, 190. The cases before cited from our own reports are in no wise in conflict with the latter proposition.

It seems equally well settled by the authorities that where there is a fraud in the sale of goods, or a breach of warranty, the purchaser may set it up as a defence in an action against him for the purchase money. If the injury sustained by the purchaser in consequence of the fraud or breach of warranty, be equal or greater than the amount of the purchase money unpaid, he may defeat the action entirely. If the injury be less, it will go in reduction of the plaintiff's claim. See cases collected on this subject in Perk. Dig., p. 728, § 37; p. 788, § 26.

And under the code a defendant may undoubtedly set up, by way of counter claim, such fraud or breach of warranty, and not only defeat the action, but recover against the plaintiff any damages greater than the plaintiff's claim, as was done in this case. The objection made to the pleading in question we think not well taken.

Per Curiam.—The judgment below is affirmed, with costs.

Thomas A. Hendrick, Oscar B. Hord and C. Ewing, for the appellant.

Samuel A. Bonner, for the appellee.

HAUCK v. GRAUTHAM.

PLEADING.—It is a sufficient allegation of marriage, in a complaint for criminal conversation with the plaintiff's wife, that, at the time she was debauched, she was his wife.

Hauck v. Grautham.

PRACTICE IN SUPREME COURT.—An alleged error, by the Court below, in suppressing a deposition, where no exception is taken, and the deposition is not set out in the record, is not available here.

APPEAL from the *Tipton* Circuit Court.

Per Curiam.—The complaint in this case alleges that *Hauck*, who was the defendant, intending to injure *Grautham*, the plaintiff, and to deprive him of the fellowship, society, aid and assistance of *Elizabeth Grautham*, his, plaintiff's, wife, did on, &c., at, &c., debauch and carnally know her, the said *Elizabeth*, she then and there being the wife of said plaintiff, &c. Defendant demurred to the complaint, but the demurrer was overruled and he excepted. He then answered by a denial. Verdict for the plaintiff, upon which, the Court, having refused a new trial, rendered judgment.

The complaint is said to be defective because it fails to allege the marriage of the plaintiff with *Elizabeth Grautham*. There is nothing in this objection. The allegation that, at the time she was debauched, she was his wife, is sufficient. The record shows that the Court, upon the plaintiff's motion, suppressed a deposition taken by the defendant. This ruling is assigned for error; but no exception appears to have been taken by the defendant to that ruling, nor is the deposition set out in the transcript; hence the alleged error is not available.

The judgment is affirmed, with 10 per cent. damages and costs.

J. W. Robinson, for the appellant.

N. R. Lindsay, for the appellee.

Ashley v. Eberts et al.

ASHLEY v. EBERTS *et al.*

25	55
127	201
22	55
120	279

DEED—RATIFICATION—ADVERSE POSSESSION.—Suit for the recovery of land. The land was granted to *A* by a treaty between the *United States* and the *Pottowattomie* tribe of Indians, made October the 16th, 1826. U. S. Stat. at Large, pp. 295, 299. The grant, Art. 6, was in these words: "The *United States* agree to grant to each of the persons named in the schedule hereunto annexed, the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed, by either of the said persons, or their heirs, without the consent of the President of the *United States*." *A*, on the 13th day of *June*, 1836, without the consent or approval of the President, executed and delivered to *B* a deed conveying to him the land in dispute; but the deed thus made was afterwards, on the 14th day of *December*, 1846, approved by *James K. Polk*, the then President of the *United States*. When the land was thus conveyed by *A* to *B*, there was no adverse possession, but in 1843 *C* went into possession of the land, and at the time of the approval of the deed, by the President, held it adversely.

Held, that the deed from *A* to *B* could not, without the consent of the President, operate as a conveyance, but that his consent to its execution might be given before or after its execution.

Held, also, that the act of the President, in his approval of the deed, related back and gave it validity from the time of its execution, so as to protect *B* against the claim, by adverse possession, of *C*, which arose in the interim between the date of the deed and the date of its confirmation by the President.

APPEAL from the *Allen* Circuit Court.

DAVISON, J.—This was an action instituted in the Circuit Court for the recovery of land. *Robert Eberts*, who brought the suit, died before trial, and in his stead his heirs were made the plaintiffs; *Ashley* was the defendant. The issues were submitted to the Court upon the following agreement of facts:

"It is agreed that the land in controversy was granted to

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James Knaggs by the treaty between the *United States* and the *Pottowattomie* tribe of Indians, made *October* the 16th, 1826. *Vide* U. S. Stat. at Large, vol. 7, pp. 295, 299. The grant, article 6, is in these words: 'The *United States* agree to grant to each of the persons named in the schedule hereunto annexed the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed by either of the said persons, or their heirs, without the consent of the President of the *United States*.' In the schedule the grantee is thus described and the land thus designated: 'To *James Knaggs*, son of the sister of *Okeos*, chief of the *River Huron Pottowattomies*, one-half section of land upon the *Miami*, where the boundary line between *Indiana* and *Ohio* crosses the same.' *Id.* p. 298. 'It is further agreed that *Knaggs*, on *June* the 18th, 1836, without the consent or approval of the President, executed and delivered to the said *Robert Eberts* a deed, conveying to him the land in dispute, being a part of said half section; but the deed thus made was afterwards, on the 14th of *December*, 1846, approved by *James K. Polk*, the then President of the *United States*.' And further, it is agreed, that when the land was conveyed to *Eberts* there was no adverse possession; but that in 1843 the defendant, *Ashley*, went into possession of the land, and that at the time of the approval of the deed by the President held it adversely."

Upon these facts the Court found for the plaintiffs, and having refused a new trial, rendered judgment, &c.

It must be conceded that the deed from *Knaggs* to *Eberts*, could not, without the consent of the President, operate as a conveyance; but his consent to the execution of such deeds may be given before or after their execution. *Doe v. Beardsley*, 2 McLean 412. The deed then became operative on *December* 14, 1846, unless the then adverse possession rendered it invalid. And we have often decided that "the convey-

Ashley v. Eberts et al.

ance of real estate, if there be such possession at the time, is void as an act of maintenance." 4 Ind. 164; 1 Ind. 181; 8 Blackf. 366; 6 *id.* 99; 1 *id.* 127. But the appellee insists that the principle thus decided does not apply; that the act of the President, in his approval of the deed, related back and gave it validity from the time of its execution; while on the other hand it is contended that the deed, when it was given, was a nullity, and, consequently, the doctrine of relation can not be applied. Which of these positions is correct? The deed, it is true, did not, before the assent of the President, convey the legal title, nor did it raise such an equity as could be enforced in a court of chancery. Still it was, as we have seen, capable of confirmation, by the President's consent to its execution, and can not, therefore, be held absolutely void. If this position be correct we perceive no reason why the doctrine of relation should not apply. And it seems consistent with justice to the grantee that the deed should be held so far effective as to protect him against any claim, by adverse possession, that might arise in the interim, between its date and confirmation, otherwise a mere trespasser, by taking possession after a valid sale and before its consummation, would have power to defeat a *bona fide* purchaser. Had the adverse claim existed at the date of the sale and conveyance by *Knaggs* it might have constituted a bar to the action; but, in this instance, the claimant did not enter upon the land until the expiration of, at least, six years after the execution of the deed. The transaction, then, between *Knaggs* and *Eberts*, though in the form of a deed, may be considered a sale and purchase subject to the approval of the President, and his act of approval as relating back to the time when the deed was executed. *Jackson v. Raymond*, 1 Johns. Cases, 85; *Jackson v. Ball*, *id.* 81; *Jackson v. McCall*, 8 Cowan 80. In the case last cited it was held that a sheriff's deed, executed

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five years after the sale, related back to the time of sale. See also *Bellows v. Maginnis*, 17 Ind. 64.

There are, however, decisions to the effect that "a deed would not relate back to the time of the contract to the injury of strangers." *Fite v. Doe*, 1 Blackf. 127; *Greewold v. Bard*, 4 Johns. 230. But these decisions were made in reference to cases in which the stranger had an interest in the land at the date of such contract. "Whenever it is intended to be shown that nothing passed by a grant, by reason that at the time there was a possession in another adverse to the grantor, the time to which the grant is to relate, is the time when the bargain or contract for the sale or purchase of the land was finally concluded between the grantor and grantee, and consequently any intermediate adverse possession before the execution of the conveyance, which is the technical consummation of evidence of the grant, can never affect it." See the opinion of the Court in *Jackson v. Raymond*, *supra*. This exposition, it seems to us, is correct, and if the act of the President can be regarded the consummation of the contract of sale, and we think it can, the defence set up by the defendant is not maintainable. Indeed this branch of the case presents but one inquiry, namely: Did the ratification of the deed render it valid from the date of its execution? This question is answered affirmatively in *Doe v. Beardsley*, *supra*, and that decision is, in our judgment, a proper construction of the act of Congress to which we have referred. *Anderson v. Lewis*, Freeman's Miss. R., p. 178. We are advised that the reasoning of the Court, in *Murry v. Wooden*, 17 Wend. 588, is to some extent in conflict with the view we have taken; but the facts of the case are essentially different from the one before us, and we are not inclined to follow it.

Per Curiam.—The judgment below is affirmed, with costs.

Case & Morris, for the appellant.

W. H. Coombs, for the appellees.

Smith et al. v. Parks et al.

SMITH *et al.* v. PARKS *et al.*

MORTGAGE—INSTRUCTIONS TO JURY.—*A* and *B*, being the owners of a certain tract of land, subscribed the same to the *D* railroad company. The railroad company subsequently conveyed the land to *E* and *F*, who afterwards conveyed the same, with other lands, by deed in fee, absolute on its face, to *G*, who died leaving the plaintiffs his heirs at law. A witness testified that *E* and *F* had contracted to build the road, and in "order to enable them to raise money and go on with the work *G* had indorsed largely for them, and the lands were conveyed to him to indemnify him as such indorser." Upon the evidence thus adduced the Court charged as follows: "The defendants insist that the conveyance by *E* and *F* to *G*, the ancestor of the plaintiffs, was intended only as a mortgage security, and was for that purpose made, and although absolute on its face, the defendants have a right to show that it was intended only as a mortgage. And if it was given by *E* and *F* to *G*, to secure him against loss, on account of his security for them, it would only amount to a mortgage, and if only a mortgage, the plaintiffs can not recover unless they were purchasers without notice."

Held, that the instruction thus given was pertinent to the issue, consistent with the proofs, and therefore properly given.

APPEAL from the *Putnam* Circuit Court.

DAVISON, J.—*Mary Smith, Letitia Sullivan, Marcus Smith, and Mary Love*, heirs of *Oliver H. Smith*, deceased, brought an action against *Parmenter Parks, Lucinda Parks* and *Milton Hite*, to recover a tract of land in *Monroe* county. The complaint is in the usual form. At the instance of the plaintiffs there was a change of venue to the *Putnam* Circuit Court, where the issues were tried. There was a verdict for the defendants, upon which the Court, having refused a new trial, rendered judgment, &c.

As appears by the records, the lands in controversy were owned by *Parks* and *Hite*, and by them subscribed to the

Smith et al. v. Parks et al.

Evansville, Indianapolis and Cleveland Straight Line Railroad Company. This subscription was made *August* the 11th, 1853, and was upon the condition that the road should be permanently located on the east side of *White* river, within one mile of the line run between *Indianapolis* and *Spencer*. On the 12th of *October*, 1853, the board of directors passed a resolution, whereby it was resolved, "that the road be," and was "thereby permanently located on the line previously run from *Indianapolis* down on the east side of *White* river, on the most eligible route to *Evansville*, inclusive." On *March* the 23d, 1854, *Parks* and wife, and *Hite* and wife, conveyed the land to the railroad company. On the 10th of *May*, 1855, the board passed another resolution, whereby it was further resolved, "that said railroad is" and was thereby "located permanently from the point of intersection of the line from *Indianapolis*, at *Martinsville*, to *Spencer*, in *Owen* county, by crossing *White* river below *Martinsville* and running on the west side of the river from the crossing to *Spencer*." On the 23d of *July*, 1856, the railroad company conveyed to *Willard Carpenter* and *John Love*, and on *July* the 26th, 1858, *Carpenter* and *Love*, by deed in fee, absolute on its face, conveyed the same, with other lands, to *Oliver H. Smith*, who died in *March*, 1859, leaving the appellants, who were the plaintiffs, his heirs at law.

James Green, a witness, testified *inter alia*, that "*Love* and *Carpenter* had contracted to build the road, and in order to enable them to raise money and go on with the work, *Oliver H. Smith* had indorsed largely for them, and the lands were conveyed to him to indemnify him as such indorser."

Upon the testimony thus adduced the Court charged as follows: "The defendants insist that the conveyance by *Carpenter* and *Love* to *Oliver H. Smith*, the ancestor of the plaintiffs, was intended only as a mortgage security, and was for that purpose made; and, although absolute on its face, the

Smith et al. v. Parks et al.

defendants have a right to show that it was intended only as a mortgage. And if it was given by *Carpenter* and *Love* to *Smith* to secure him against loss on account of his surety for them, it would only amount to a mortgage, and if only a mortgage, the plaintiffs can not recover unless they were purchasers without notice."

The appellants contend that the charge thus given was erroneous; "that the deed being absolute on its face, and there being no written defeasance, they are entitled to recover, notwithstanding any verbal understanding that the land should be held as an indemnity."

The statute concerning mortgages, sec. 1, says: "Unless a mortgage specially provide that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same." 2 R. S., G. & H., p. 355. Was the conveyance in this case, in effect, a mortgage? If it was the plaintiffs were not entitled to recover in this action. But it is argued that the section, to which we have referred, relates alone to mortgages which are such on their face. We are not inclined to adopt that construction. Anterior to the statute relative to mortgages now in force, it was often decided that deeds for the conveyance of real estate unconditional in their terms might be shown to be intended by the parties as mortgages. *Blair v. Bass*, 4 Blackf. 589; *Hayworth v. Worthington*, 5 id. 361. And the same principle has been recognized in this Court since the adoption of the code. *Wheeler v. Rustin*, 19 Ind. 334. The statute uses the term "mortgage," and we are to look to the common law for a definition of that "term." By that law conveyances, though absolute upon their face, if given as security for a debt, are declared to be mortgages. Nor do we perceive anything in the statute in conflict with the position that a deed unconditional in its terms, may be shown to be in effect a mortgage, and as such be subject to the ordinary process of foreclosure.

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True, prior to the existing rules of pleading and practice, actions of this sort would have been deemed strictly actions at law, and defendants could not have availed themselves of the defence now set up. But all distinction between actions at law and suits in equity has been abolished; 2 R. S., G. & H., p. 33; and hence there seems to be no reason why the defence in question should not, in this case, be held available. Indeed, there is an express provision of the statute which, in actions for the recovery of real property, authorize every defence that the defendant may have, either legal or equitable, to be given in evidence under the general denial. 2 R. S., G. & H., p. 283; *Vail v. Halton*, 14 Ind. 344. The evidence conclusively shows that the deed executed to *Smith*, the ancestor of the plaintiffs, was, in point of law, a mortgage only, and being so it constituted an effective bar to the action, because the defendants had a right as against these plaintiffs to possess the property until, as a mortgage, it was foreclosed. The instruction, therefore, was pertinent to the issue and consistent with the proofs, and was therefore properly given. Other points are made and discussed by the parties; but, as the view we have taken at once shows that the action to recover possession of the land is not maintainable, they will not be noticed.

Per Curiam.—The judgment is affirmed, with costs.

Thos. A. Hendricks, J. E. McDonald, A. L. Roache and D. McDonald, for the appellants.

Franklin & Hester, for the appellees.

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THE TERRE HAUTE, ALTON AND ST. LOUIS RAILROAD COMPANY
v. NORMAN.

186	68
181	29
82	63
141	179

PLEADING—ESTOPPEL.—Suit by *A* against the *T* railroad company for the assessment of damages, on account of the taking by the company for the use of her road, of a lot in *B*, belonging to *A*. The sixth paragraph of the answer alleged that in the year 1852, one *C* being in possession of the lot, and claiming the ownership thereof, with the full knowledge of *A*, died, leaving a widow and minor heirs; that one *D* was appointed by the proper Court guardian of said heirs, who filed his petition in the *E* Court of Common Pleas, for the sale of the interest of said heirs in the lot in question, procured an order of sale, sold the lot to the defendant at its full appraised value, reported the sale to the Court, which was approved; that the defendant paid the purchase money in full; that a deed was ordered, executed and approved by the Court; that *D* afterwards made a final settlement of his said trust, and obtained a discharge therefrom; that afterwards *A*, who was the grandfather of said minor children, having knowledge of the facts, and for the purpose of procuring the full proceeds of said sale for said children, made a voluntary application for their guardianship, and on the day of his appointment brought suit, as such guardian, against *D*, on his bond, setting out the sale and the receipt by *D* of the purchase money, alleging the failure to pay over the full amount so received, and asking a judgment for 1,500 dollars, which the company insisted was an affirmation of the judicial sale, and estopped *A* from maintaining his suit.

Held, that the said paragraph was not good as a plea in estoppel, because it did not show that the *T* railroad company purchased the lot, or paid the consideration therefor, on the faith of some act or statement of *A*, or of his silence under circumstances that required him to speak and disclose his title, nor any act of said *A* subsequent to such purchase, which amounted to a ratification of the sale made by *D*.

CONTINUANCE.—An affidavit for a continuance stated that *F* would testify that *A* sold the lot in question to *G*, by title bond, and gave

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possession; that *G* transferred the bond and the possession to *C*, who settled, satisfied and fully discharged the full amount of the purchase money to *A*; that at the time of the sale of the lot to the *T* company *A* was absent from the State, and his wife, *M*, was his constituted agent, having full authority from him to attend to and manage all his business; that she had full knowledge of the said sale, and of the payment by the company of the purchase money, and was, at the time, consulted by the agents of the company as to the title of *C*, and set up no claim for *A*, but by her conduct, actions and representations induced said agents to believe that *A* could set up no claim to the said lot; and that relying upon such silence, conduct and representations, the company made the purchase and paid the money, &c.; that *F* was colonel of the 85th regiment in active service, and was then in the State of *Tennessee*; and that his deposition had not been taken, because, for more than six months, he had been moving from place to place in the discharge of his military duties, so that the defendant could have no assurance that he would remain at any one place sufficiently long to give reasonable notice to the plaintiff, &c.

Held, that as there was a paragraph of an answer, if not more than one, under which the proposed evidence would seem to have been legitimate, the continuance should have been granted.

APPEAL from the *Vigo* Circuit Court.

WORDEN, J.—Complaint by *Norman* against the company for the assessment of damages, on account of the taking by the company, for the use of her road, of a lot in *Terre Haute* belonging to the plaintiff. The proceedings were had under the act of 1855 providing for such assessment. 1 G. & H. 528-9. Issue, trial, finding and judgment for the plaintiff.

A demurrer was sustained to the 6th paragraph of the answer. That paragraph alleged the following facts: That in the year 1852 one *Lewis P. Schoovee*, being in possession of the lot and claiming the ownership thereof, with the full knowledge of *Norman*, died, leaving a widow and minor heirs; that one *John Sibley* was appointed by the proper

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Court guardian for said heirs, who filed his petition in the *Vigo* Court of Common Pleas for the sale of the interest of said heirs in the lot in question, procured an order of sale, sold the lot to the defendant at the full appraised value, reported the sale to the Court which was approved; that the defendant paid the purchase money in full; that a deed was ordered and executed, and approved by the Court; that said guardian afterwards made a final settlement of his said trust and obtained a discharge therefrom; that afterwards the said plaintiff, who was the grandfather of said minor children, having knowledge of the facts, and for the purpose of procuring the full proceeds of said sale for said children, made a voluntary application for their guardianship, and on the day of his appointment brought suit, as such guardian, against *Sibley* on his bond, setting out the sale and the receipt by *Sibley* of the purchase money, alleging a failure to pay over the full amount so received, and asking a judgment for 1500 dollars; which the company insists is an affirmation of the judicial sale, and an estoppel of *Norman* in this suit.

It is claimed by the appellant that the facts thus alleged should estop the plaintiff to maintain this proceeding, and consequently that error was committed in sustaining the demurrer.

We are of opinion that the facts pleaded do not constitute an estoppel. It may be admitted that a party who has expressly, or by his acts, waived his title to property, will be estopped from asserting it against a party who has invested his money on the faith of such waiver. *Laney v. Laney*, 4 Ind. 150; *Gatling v. Rodman*, 6 Ind. 289.

But to constitute an estoppel *in pais*, it may be stated as a general proposition that the party to be estopped must, either by himself or some one authorized to act for him, have done some act, or made some statement, or remained silent under circumstances that required him to speak, on the faith of

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which act, statement or silence the other party has been induced to invest his money or change his position. *Beach v. Mitchell*, 14 Ind. 397; *Carter v. Harris*, 16 Ind. 887; *Ray v. McMurtry*, 20 Ind. 307.

The pleading here does not show that the defendant purchased the lot, or paid the consideration therefor, on the faith of any act or statement of the plaintiff, or of his silence under circumstances that required him to speak and disclose his title. All that the plaintiff has done which has the semblance of a waiver of his title has been done since the defendant made the purchase and paid for the lot. The case of *Wiseman v. Macy*, 20 Ind. 239, cited by the counsel for the appellant, does not sustain the pleading in question. On the contrary it harmonizes with the proposition above stated. In that case a widow, entitled to dower in the half of a certain lot, was the guardian of her child, who owned the inheritance. Under an order of the Probate Court she, as such guardian, sold the entire half lot, received the purchase money and made a deed, without reserving or disclosing her right of dower, the purchaser being ignorant thereof. She was held to be estopped from afterward setting up her right of dower. Her conduct in selling the entire half lot without reservation or disclosure of her interest, brings the case very clearly within the proposition stated.

But there is a class of cases in which it is held that an estoppel may arise upon matter that transpires after the purchase, and on the faith of which the purchaser did not make his investment. Thus, if one's land be sold, either by an authorized agent, or under color of judicial proceedings or other authority of law, and he afterwards receive the proceeds of the sale, or a part thereof, knowing the facts, he is held to be estopped from disputing the validity of the sale. *Smith v. Warden*, 19 Penn. S. R. 424; *The State v. Stanley*, 14 Ind. 409. The case of *Smith v. Warden* was thus: A man

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died owing a debt, and leaving heirs and some land. A judgment was recovered against his administrator for the debt, but the heirs were not made parties. On this judgment the land was sold. It was held that although no title passed by the sale because the heirs were not parties, yet one who received her portion of the surplus after paying the debt was estopped to dispute the validity of the sale. In the case of *The State v. Stanley*, the school land of the inhabitants of a township had been sold by the proper officer. The inhabitants had received the proceeds, which had been applied to the purposes intended by the original grant of the land to the inhabitants of the township. They were held estopped to dispute the validity of the sale. But in these cases the land was sold as the land of the parties held to be estopped by the receipt of the proceeds, and the proceeds were received in virtue of such original ownership.

The estoppel would only seem to preclude a party from contesting the validity of proceedings whereby the title of such party is transferred, or attempted to be transferred, to the purchaser.

Where a sale and conveyance do not profess or attempt to transfer any title from a person, who afterwards receives the proceeds in virtue of some other claim to them than as the original owner of the land, it is difficult to see on what substantial ground he can be held estopped, by such receipt, from setting up his own title; a title never attempted to be transferred.

If it be said that by such receipt of the proceeds, the party receiving them ratifies the sale, it may perhaps be successfully answered that a ratification only makes good that which purports to have been done; and as the sale in such case does not purport to divest the party thus receiving the proceeds of his title, his ratification of such sale can not have that effect.

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But the law on the subject of ratifying that which has been done by another, has no application whatever to such case, and therefore can not furnish a basis on which to rest an estoppel. It is undoubtedly true that a man may ratify an act done for him or in his name, although done without previous authority, and such ratification makes the act as valid and as binding upon him as if done with his previous authority. *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577. But this principle only applies where the act was done for or in the name of the party who thus makes it good by way of ratification. *Wilson v. Tumman*, 46 E. C. L. 235. In that case the Court say, "that an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and established rule of the law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same extent as by and with all the consequences which follow from the same act done with his previous authority. Such was the precise distinction taken in the year-book, 7 Hen., 4 fo. 35, that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. In the case of *The Farmer's Loan and Trust Co. v. Walworth*, 1st. N. Y. 433, 444, the Court say, in speaking of the case of *Wilson v. Tumman*, *supra*, "It is undoubtedly a general rule, as was said in that case, that a man can not adopt an act which was neither done for him, nor in his name.

The case of *Heath v. Clinton*, 12 M. & W. 631, is a strong one to show that a man can not ratify an act which was not

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done for him or in his name. There were three executors of an estate. Two of them made a contract with a third person, in their own names, for the collection of rents due the estate. It was held that an action would not lie against such third person for rents thus collected by him, in the name of the three executors, unless it was shown that the contract was made on behalf of all the executors, and not on behalf of the two only who made the contract. *Parke, B.*, in delivering the judgment of the Court, says: "But then it was agreed that although the contract was with two only, the third executor might adopt it, and all three sue upon it; and it is clear that he might have done so if the two had employed the defendant, and the defendant had contracted with them on their own account, and as agents for the third executor, on the principle expressed in the legal maxim, *omnis ratihabitio retrotrahitur et mandatur prior aequiparatur*. But if the contract was with the two on their own account only, they could not; for to such a case the maxim does not apply."

In 1 Am. Lead. Ca., 8d ed., p. 572, the rule deducible from the authorities is thus stated: "And though to be capable of ratification, an act must have been done for, or on behalf of, the principal, yet it is not necessary that any relation of agency should previously have existed; for if a perfect stranger assumes to act for a party the latter may adopt his agency with an effect equivalent to a previous authority."

Now, applying the doctrine to the case before us, it is clear that *Norman* can not be divested of the title on the ground of ratification, for the sale by the guardian was not an act which he could ratify; the guardian was not acting for him nor professedly selling his land. Had the land, either by a judicial or a private sale, been sold as the land of *Norman*, there would have been, perhaps, such an acting on his behalf as would have made the transaction susceptible of a ratification by him.

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We have thus far considered the case as if *Norman* had actually received the money as such guardian, instead of having sued for it merely. And aside from the consideration already stated, there is another ground on which it is clear that he would not be estopped if he had received the money. It is assumed by the counsel for the appellant that *Norman's* claim of the money as such guardian is totally inconsistent with his claim of title to the lot, and that the maxim, "he is not to be heard who alleges things contradictory to each other," should be applied to him. The law, it is said, in the figurative vernacular of Lord *Kenyon*, does not permit a man "to blow hot and cold" in reference to the same transaction.

But is there really any inconsistency in the two claims? We think not.

There is no warranty of title in judicial sales. *Morgan v. Fencher*, 1 Blackf. 10, and notes. Nor in private sales of land unless there are covenants of warranty. *Laughery v. McLean*, 14 Ind. 106; *Johnson v. Houghton*, 19 Ind. 359. *Sibley*, the former guardian, was not liable to refund the purchase money to the defendant in the case of an eviction by a paramount title. If he had any money in his hand arising from the sale, unaccounted for, his former wards were entitled to it, and he was both morally and legally bound to pay it to them. He can not be heard to say that he should not account to them for the money on account of the failure of title. The wards were entitled to the money although the title failed, as the purchaser bought such, and only such title as they had. *Norman*, as their guardian, had a right to sue for and receive the money from *Sibley*, the former guardian. Such suit, and the receipt of the money, does not affirm on behalf of *Norman* that any title had passed by the sale. He had a right to receive the money whether any title passed or not. Hence there is no inconsistency whatever in his claim of the

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money and his claim of title to the lot. The demurrer was correctly sustained.

Before the trial the defendants moved for a continuance, and filed the affidavit of *William E. Hendricks* in support of the motion. The motion was overruled, and exception taken.

The affidavit states that *Col. Baird* would testify that *Norman* sold the lot in question to one *Ganier* by title bond, and gave him possession; that *Ganier* transferred the bond and the possession to *Schoovee*, who settled, satisfied, and fully discharged the full amount of the purchase money to *Norman*; that at the time of the sale of the lot to the company *Norman* was absent from the State, and his wife, *Matilda*, was his constituted agent, having full authority from him to attend to and manage all his business; that she had full knowledge of the said sale and of the payment by the company of the purchase money, and was at the time consulted by the agents of the company as to the title of the said *Schoovee*, and set up no claim for *Norman*, but by her conduct, actions and representations induced said agent to believe that *Norman* could set up no claim to the said land, and that relying upon such silence, conduct and representations, the company made the purchase and paid the money; that *Baird* is colonel of the 85th regiment, in active service, and is now in the State of *Tennessee*, and that his deposition has not been taken, because for more than six months he has been moving from place to place in the discharge of his military duties, so that defendant could have no assurance that he would remain at any one place sufficiently long to give reasonable notice to the plaintiff. And that *Cruft* would testify that he was President and acted for the company in the purchase of the lot, and was familiar with all the facts; that he would testify as to the sale by *Norman* to *Ganier* of the lot by title bond, by *Ganier* to *Schoovee*, and the full payment of the purchase

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money by *Schoovee* to *Norman*; that before the purchase by the company *Cruft* asked *Mrs. Norman*, who was the agent of the plaintiff, whether *Norman* had any interest in the lot, and that she then said that he had no interest in the lot, and induced him, upon the said representations, to buy the lot for defendant; that *Cruft* has been for the last six months in the active service of the *United States*, in the State of *Tennessee*. That affiant believes the facts stated to be true, and that defendant was unable to prove such facts by any other witness whose testimony could be so easily procured; that defendant has not been able to take the deposition of *Cruft*, for the reason that he has been engaged in the active operations in the field, and changing about from point to point in the States of *Kentucky* and *Tennessee*, and that he expected to have depositions of both witnesses at the next term of Court.

There was a paragraph of an answer, if not more than one, under which the proposed evidence would seem to have been legitimate, and we think the continuance should have been granted. We have no brief for the appellee and are not advised on what ground the continuance was refused. We see no substantial objection to the affidavit, and think that a case was presented that entitled the defendant to a continuance to enable her to procure the evidence mentioned. For the refusal of the continuance the judgment will have to be reversed.

Per Curiam.—The judgment is reversed, with costs.

Ballard Smith, for the appellant.

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PLEADING—COMPLAINT—DEMURRER.—Where a pleading is founded on a written instrument, the original or a copy must be filed with it; and if the original or a copy is not so filed, the defect may be reached by a demurrer.

PRACTICE.—In order that the Court may know that a written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading.

SAME.—A failure to deny, under oath, the execution of an instrument that does not show an apparent execution on its face, is not an admission of its execution.

SAME—SPECIAL FINDING.—A special finding must be in writing so that an exception may be taken; and it must be filed with the clerk, so that he can enter it, and the exception to it, of record. And as evidence of its genuineness to an appellate Court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him.

ACTION.—A policy of insurance, which has not been executed, will not support an action; but if there was a valid agreement to insure and to issue a policy, an action may be brought upon such agreement.

POLICY OF INSURANCE—EXECUTION OF.—It was necessary to a complete execution of the policy of insurance, in this case, that it should be signed by the President and Secretary, and countersigned by the agent.

MARINE POLICY—COVENANT IN.—Where, in a policy of insurance on a vessel, there is a stipulation "that the master and crew, so soon as practicable after the disaster and the property is secured or recovered, shall repair to the nearest convenient notary, and there make a protest setting forth the cause of said disaster as near as practicable, and the extent of the damage," such stipulation is a binding condition, upon the insured, and must be performed to entitle him to recover.

SAME—EXCUSE FOR NON-PERFORMANCE.—Neither the want of knowl-

22	73
120	502
22	73
144	314
22	73
171	410

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edge of the master and crew that the vessel was insured, nor the casual remark of the agent of the insurance company, before the policy was issued, that if the owner insured he would send him, the master, word, which he failed to do, will excuse the performance of such stipulation.

SAME—WAIVER OF PERFORMANCE.—The simple direction of such agent, to one of the crew, to go before an officer and make a protest, &c., is not a waiver of the legal right of the company to a legal protest in the case.

PRACTICE IN SUPREME COURT—CERTIORARI.—A *certiorari* where the alleged defect does not appear upon the face of the record, and the application alleging it is not verified, will not be granted; nor, as a general rule, after a cause has been decided.

APPEAL from the *Dearborn* Circuit Court.

PERKINS, J.—The appellee sued the appellant upon a complaint in two paragraphs.

The first paragraph avers that on the 11th day of *October*, 1859, the appellee was the owner of a certain flat-boat called the "No. One," lying in the *Ohio* river at the port of *Aurora*, in *Dearborn* county, State of *Indiana*, which was loaded with a cargo of one hundred and forty tons of hay, of the value of 2500 dollars, the property of the appellee; that the boat, so loaded, was properly manned and equipped for a voyage to the port of *New Orleans*, and that afterwards, at that date, at said county and State, the appellant, by *A. Andrews*, her authorized agent for the city of *Aurora*, said county, at the request of the appellee, in consideration of the sum of 126 dollars, paid to the appellant by the appellee, did insure the cargo of said flat-boat in the sum of 2100 dollars, from said port of *Aurora* to said port of *New Orleans*, against the perils of the river, jettisons, enemies, &c., and that said appellant, by her said agent, issued to the appellee a policy of insurance for said risk, which policy is filed with the complaint, and is made part thereof; that said boat and cargo, properly manned

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and equipped, on the day and year aforesaid, left the port of *Aurora* for the port of *New Orleans*, and that said boat, with said cargo, manned and equipped as aforesaid, proceeded on said voyage to a place in the *Mississippi* river called *Cypress Bend*, when said boat was wrecked and lost by a peril of the river, to-wit: a very high wind forced and blew said boat upon a snag, whereby she was sunk and her cargo damaged and lost, of which the appellant had due notice on the first day of *December*, 1859, and formal protest was delivered to defendant on the 17th day of *January*, 1860; concluding with an averment of damage in the sum of 3000 dollars; a request to the appellant to pay the amount of the insurance, 2100 dollars; a refusal, and a prayer for judgment.

The second paragraph is substantially the same as the first, with some additional averments; that the length of the boat was about one hundred and twenty feet, and the width eighteen feet; that her rigging consisted of two sets of sweeps, one set of side sweeps consisting of three, and one set of end sweeps consisting of two, called a steering oar and gouger, two good and sufficient wrought iron anchors and gougers, two check posts and one check line one hundred and fifty feet long; that the boat was manned with six competent hands, and *Charles Buffington*, her master and pilot, and that her draught of water was thirty-six inches, and no more; that on said 11th day of *October*, 1859, the appellee applied to the appellant at said port of *Aurora* for said insurance, and that appellant, by said *Andrews*, her agent at said port, examined said boat, cargo, rigging and equipments, and being satisfied therewith, by her agent, issued said policy.

That said snag stove a hole in the side of said boat below the water line, and the boat immediately sank; that the disaster occurred on the 15th day of *November*, 1859, and that the pilot and hands of the boat, with the assistance of the crew of the steamboat *Walsh*, immediately proceeded to save

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the cargo, and did save in good condition forty-eight tons, one thousand seven hundred and sixty pounds of hay, in two hundred and fifty-seven bales; and also five tons, eight hundred and sixty pounds of hay, twenty-seven bales, in a damaged condition; being damaged in the sum of fifty per cent. That the residue of the cargo, ninety-five tons, fourteen hundred and eighty pounds, was, by the disaster, totally and wholly lost.

That the master and pilot of the flat-boat immediately shipped the hay so saved to the port of *New Orleans*, on the steamboat *Walsh*, in charge of *Walser*, one of the hands of the flat-boat.

The paragraph sets out the expense of saving, shipping, &c., the hay, amounting to 652 dollars and 22 cents; that the appellant had due notice of the loss, to-wit: on the 1st day of *December*, 1859, and that on the 17th day of *January*, 1860, the appellee caused a protest of the loss to be duly made and delivered to the agent of the appellant at *Aurora, Indiana*, and at the same time delivered the agent an account current of the sales of the hay, and the freight and expenses thereon.

That at the time of the disaster the freight and expense of running said cargo to *New Orleans* had been incurred by the appellee.

Prayer of judgment, &c., &c.

The policy sued on is set out in the record. To the first paragraph of the complaint a demurrer was sustained, and it was amended, and the amended paragraph is set out in the record. It was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, but the demurrer was overruled and the appellant excepted.

The appellant demurred to the second paragraph of the complaint for the same reason, but the Court overruled the demurrer, and they excepted. The appellant answered in four paragraphs. The first was a general denial.

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The second averred that the boat and cargo were not sunk by a peril of the river, as in the complaint stated, but by the negligence and misconduct of the master and crew of the boat.

The third averred that said disaster occurred on the 15th day of *November*, 1859, at *Cypress Bend*, in the *Mississippi* river, and that on the same day the master and crew saved and recovered the property, and shipped on the steamer *Walsh* to the port of *New Orleans*, all that part of the cargo required to be shipped to the port of destination, and on the 15th day of *November* aforesaid, made sale of the wreck.

That on the 17th day of *January*, 1860, *Charles Buffington*, pilot, and *George Collier* and *William Walser*, hands on said flat-boat, went before one *Carter Gazley*, a notary public of said county of *Dearborn*, in the city of *Lawrenceburg* in said county, and entered protest of said disaster.

That said protest was the only protest of said loss made by the pilot and crew of said flat-boat, and that the same was not made as soon as practicable after said disaster and the securing and recovering of the property, but was made more than two months thereafter.

That said *Gazley* was not the nearest convenient magistrate or notary public to the place of the disaster; that said city of *Lawrenceburg* was eight hundred miles distant from the place of disaster, and that at the time of the disaster, there were magistrates and notaries public residing within the States of *Arkansas* and *Mississippi*, where said river forms the boundary line between said States. The protest was filed with the complaint, and made a part of it.

The fourth paragraph avers that on the 11th day of *October*, 1859, the appellee made and delivered the appellant an application in writing, for an insurance on the flat-boat and cargo in the complaint stated.

That in the application, the appellee undertook and war-

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rauted, that the number of the crew of said boat should be seven hands besides the pilot; that the said boat should have two anchors, one of one hundred and eight pounds, the other of one hundred and eighteen pounds weight, and should not be laden deeper than thirty-four inches at the bow, and thirty-six inches at the stern.

The appellant avers that at the time of the disaster, the boat had not a crew of seven hands besides the pilot; that she had not two anchors weighing one hundred and eight and one hundred and eighteen pounds respectively, and that she was laden deeper than thirty-four inches at the bow, and thirty-six inches at the stern.

The application is made a part of the answer.

The appellee demurred to the second, third and fourth paragraphs of the answer, because neither stated facts sufficient to constitute a defence.

The Court overruled the demurrer.

The appellee replied in four paragraphs.

The first is a general denial.

To the second a demurrer was sustained, and will not be further noticed.

The third replies to the fourth paragraph of the answer.

That the written application was made out by *Austin Andrews*, the appellant's agent at *Aurora*, upon his own survey and inspection of the boat, the same being then fully laden, and of the furniture, rigging, and equipments of the boat, and the agent specified in the application the size and description of the boat, and of its equipments, the depth to which the boat was laden, and the number of crew upon the boat, according to his own view thereof; that the only contract between the appellee and the appellant, as to the number of hands required on the boat, is that contained in the policy issued by the appellant, after receiving the application, namely: that the boat should have not less than six competent

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hands and a pilot, although it is true that one of the hands, being the cook, who was on the boat at the time of the survey thereof by said agent, did afterwards, before arriving at the place of disaster, without cause and against the will of the master, desert and leave the boat.

Yet there remained and were on the boat, at the time of the disaster, six competent hands, besides the pilot.

That the flat-boat had at the time two anchors weighing, as stated in the application, and that said boat, at the time the said application and survey were written out by the agent and signed by the appellee, was not laden deeper than thirty-four inches at the bow, and thirty-six inches at the stern, and was not, at any time thereafter, laden deeper.

The fourth paragraph replies to the third paragraph of the answer.

It avers that, at the time of making the application, the agent of the company at *Aurora* declined to issue the policy until he could consult with the officers of the appellant at *Peoria, Illinois*, by telegraph, and said flat-boat left *Aurora* upon her voyage before the company had accepted the application, or taken any risk upon said cargo, and said agent promised and undertook to inform said pilot by letter, or otherwise, whether the company had taken the risk upon said cargo. But the agent never sent, nor did the pilot ever receive any such information, and that the pilot and crew were ignorant, at the time of the disaster, that said cargo was insured, and remained ignorant thereof until they arrived at said port of *Aurora*, upon their return from said voyage, when said master, or pilot, immediately called upon said *Andrews*, who directed him to go before *Robert Q. Terrill*, a notary public of said port, and make protest of the loss which had happened to said cargo.

And said master, with two of the crew, *Collyer* and *Boyer*, thereupon called upon said *Terrill*, and requested him to re-

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ceive and make out such protest, and did make before said *Terrill* a protest setting forth the cause of said disaster, and the extent of the damage. But said *Terrill* did not furnish record or written statement of said protest which could be taken for delivery to appellant, saying that he could not do so until he went to *Cincinnati* and got a proper form for such a document.

And *William Walser*, one of said crew, who went to *New Orleans* to make sale of the portion of the cargo that was saved, returned immediately after said sale to *Aurora*, and forthwith went before said *Terrill* to make or join in such protest, said *Andrews* saying that said *Terrill* was the only person who could make out a protest.

The appellee further averred, that he was not upon said flat-boat at any time after the commencement of the voyage; that before *Terrill* had recorded or made out the protest of said pilot and crew, or either of them, the pilot, without the knowledge or consent of appellee, went down the river as pilot upon another flat-boat, the appellee supposing that due and proper protest had been made by him and said crew before said *Terrill*.

That *Lindsay*, one of the crew, resided in the State of *Illinois*, and has never returned to this State since the disaster; that *Lorenzo D. Low*, another of the crew, did not return until the summer of 1860, and that ——— *Roberts*, the other hand, was not within the county of *Dearborn*, to the knowledge of the appellee, until after the bringing of this suit; that as soon as said *Buffington*, pilot, returned after said last mentioned voyage, he and two of said crew made due protest before *Carter Gazley*, notary public, of *Dearborn* county, *Indiana*, setting forth the cause of said disaster, and the extent of the damage, which was delivered to appellant the 17th day of *January*, 1860; that the appellant had due notice of the loss, and the extent of the same long before the making

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of said protest, to-wit: "on the 25th day of *November*, 1860."

The appellant demurred to the second, third and fourth paragraphs of the reply. The Court sustained the demurrer to the second, and overruled it as to the third and fourth paragraphs. As to the latter ruling, the appellant excepted.

The cause was submitted to the Court for trial. There was a finding for the appellee in the sum of 1,900 dollars; a motion for a new trial; motion overruled, and a judgment on the finding.

In considering the case, we will first examine the complaint. It is based upon a policy of insurance as constituting the foundation of the action. That policy is described as being in writing.

The code (sec. 78 2 G. & H. 104) provides that: "When any pleading is founded upon a written instrument or an account, the original or a copy thereof must be filed with the pleading."

This defect in pleading may be reached by demurrer. *Woodford v. Leavenworth*, 14 Ind. 311; *Price v. The Grand Rapids, &c. Co.*, 13 id. 58; *Kiser v. The State*, id. 80.

It is further settled that, in order that the Court may know that the written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading. *The Indianapolis, &c. Co. v. Remmy*, 13 Ind. 518; *Hiatt v. Gobel*, 18 Ind. 494; see id. 11 and 156; also, *Price v. Grand Rapids, &c., supra*.

The complaint in this case is objected to on the ground just stated, but we think, in this particular, it is substantially sufficient.

The complaint is predicated, as we have said, upon a written policy of insurance, and if the appellee can recover, it is

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upon the policy which is said to be exhibited. The policy exhibited commences :

"The *Peoria Marine and Fire Insurance Company* do insure, and cause to be insured, lost or not lost, *James Walser*, of *Manchester*, county of *Dearborn*, and State of *Indiana*," &c.

It concludes thus:

"In witness whereof, the President of the said insurance company has hereunto subscribed his name and caused the same to be attested by their Secretary, at their office in *Peoria, Illinois*, this 11th day of *October*, 1859. But the same shall not be valid until countersigned by *A. Andrews*, agent, at *Aurora, Indiana*. _____, President.

"_____, Secretary.

"Countersigned at *Aurora*, the 11th day of *October*, 1859.

"*A. ANDREWS*, Agent.

No. 11. "*Peoria Marine and Fire Insurance Company, Peoria, Illinois; James Walser, Manchester, Indiana:*

FLAT BOAT CARGO POLICY.

Amount insured.....	\$2,100 00
Rate per cent.....	6 00
Cash premium.....	126 00
Policy.....	1 00

"*A. ANDREWS*, Agent, *Aurora, Indiana*."

The policy exhibited was not signed by the president, or attested by the secretary, and the signing and attestation are by the policy declared to be the evidence of execution by the company.

It is claimed that the policy is inoperative because it is not executed by the company. If, in fact, the policy upon which the complaint is founded has not been executed by the company, it will not support an action, and the suit should

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have been upon the agreement to insure, and to issue a policy, if such a valid agreement existed. *Kentucky Mutual, &c. Co. v. Jenks*, 5 Ind. 96.

At common law, a parol contract for insurance, is valid. *Commercial Mutual, &c. Co. v. Union Mutual, &c. Co.*, 19 How. (U. S.) Rep. 318.

See as to whether both parties are bound where a contract within the statute of frauds is reduced to writing and signed by one party only, *Smith v. Smith*, 8 Blackf. 208; also, 20 Ind. 19. A contract for insurance is not within the statute of frauds of *Indiana*.

But the suit, in this case, as has been said, is not upon an agreement for a policy, but upon what is claimed to be a policy executed by the company. Does it appear to be such? No part of the charter of the company appears in the record; nor is there any thing showing the extent of the powers of *Andrews*, the agent who countersigned the policy. We labor, therefore, under disadvantages, in examining the questions argued by counsel.

It seems to us that the policy sued on, so far as the complaint shows, is but a partially executed instrument, and is, therefore, invalid. It would seem that, to a complete execution of the policy, it was necessary that it should be signed by the president and secretary of the company, and countersigned by the agent. The policy in question is not signed by the president and secretary. It is only countersigned by the agent. How does it differ from the case of a promissory note, not signed by the principal, but only witnessed by an agent? See *Lynn v. Burgoyne*, 13 B. Monroe, 400; *Perry v. The Newcastle, &c. Co.*, 8 (U. C.) Q. B. Rep. 863; *Daniels v. The Hudson, &c., Ins. Co.*, 12 Cush. 416; *Jones v. Hawkins*, 17 Ind. 550; *Allison v. Hubbell*, *id.* 559.

And it may be observed that a failure to deny under oath the execution of an instrument that does not show an appa-

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rent execution on its face, is not an admission of its execution.

Another question arises on the overruling of the demurrer to the fourth paragraph of the reply to the third paragraph of the answer, touching protest of the disaster to the insured cargo. It is an implied obligation on the part of the owner of an insured vessel that, if possible, it shall be kept seaworthy, including, under that term, a sufficient crew to manage it. Sometimes express stipulations touching some points on this subject are inserted in the policy of insurance, and thus made matter of express contract; for a policy of insurance is simply a contract between parties, to be lived up to, or broken, and the consequences of breach incurred, as in cases of other contracts.

In the case at bar the policy stipulated that the crew should not be less than six hands and a pilot, and there were that number on board at the time of the disaster. The policy also contained the stipulation, that "the master and crew, so soon as practicable after the disaster, and the property is secured or recovered, shall repair to the nearest convenient magistrate or notary and there make a protest setting forth the cause of said disaster as near as practicable, and the extent of the damage." The loss occurred twenty-five miles below *Napoleon* on the *Mississippi* river. These executory stipulations became binding conditions upon the insured and must be performed, to entitle him to recover, whether the thing stipulated be material or not. *Grant* against *The Lexington Ins. Co.*, 5 Ind. 28; 3 Kent., 6 ed. 376; 5 Ind. 417.

Here, then, by contract, there were to be—

1. A protest of loss,
2. To be made as soon as practicable after the loss,
3. "By the master and crew,"
4. Before the nearest convenient magistrate or notary.

This stipulation, to be performed on the part of the in-

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sured, was not performed. Is sufficient excuse shown? It is a general proposition that performance of covenants will not be excused, by the inconvenience, difficulty, or even impossibility of their performance. *Harmony v. Bingham*, 2 Kernan 99; *Oakley v. Morton*, 1 Kernan 25; 2 Parsons on Cont. 182, foot, (4th ed.); *Brecknock Co. v. Pritchard*, 6 Term R. 750; *Atkinson v. Ritchie*, 10 East 580; *Gilpins v. Consequa*, Pet. C. C. 86; Story on Cont., § 975 (8d ed.); *Beebee v. Johnson*, 19 Wend. 500; Chitty on Cont. 734; *Medeiras v. Hill*, 8 Bing. 281; S. C., 21 Eng. Com. Law R. 519.

The excuse here given is that the master and crew did not know that the boat was insured; but it was the fault of the plaintiff that they did not. The company did not waive this to the plaintiff, and the casual remark of the agent to the master before the policy was issued, that if the plaintiff insured he would send him, the master, word, amounted to nothing. That was no part of the contract. There was no consideration for it, nor does it appear that it was ever communicated to the plaintiff, the insured party. Nor, as a fact, was the simple direction of the agent to one of the crew to go before an officer and make a protest, a waiver of the legal rights of the company to a legal protest in the case; *Byrne v. The Rising Sun Ins. Co.*, 20 Ind. 103; even if the agent had the power to make such waiver, which does not appear. *Conover v. The Mutual, &c. Co.*, 2 Pet. (U. S.) Rep. 25; *Dawes v. North River Ins. Co.*, 7 Cow. 462; 22 Barbour (N. Y.) Rep. 527; 4 Kernan 418; 1 Comstock 290; 3 Wood. & Minot 529; 1 Hoffman (Chy.) Rep. 172; 1 Greene (N. J.) Rep. 110.

Another point is made. The *Peoria, &c. Co.*, is a foreign corporation, and can issue valid policies of insurance in this State only after having complied with certain conditions. This was decided in the case of *The Rising Sun Insurance v. Slaughter*, 20 Ind. 520, and a like ruling has been made in other States. *Jones v. Smith*, 3 Gray 500; *Washington Insurance*

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Co. v. Dawes, 6 Gray 376; *General Mutual Fire Insurance Co. v. Philips*, 18 Gray 90; *Washington Insurance Co. v. Hastings*, 2 Allen 398; *Williams v. Chenay*, 8 Gray 206; *Ætna Insurance Co. v. Harvey*, 11 Wis. 894. And it is contended that, in a suit by either party, on such contract, the complaint should aver that such conditions had been complied with.

In the case of *Williams v. The Insurance Company of North America*, 9 How. Prac. 865, the rule is stated thus: "When a statute declares that a deed or contract is void, if, or provided, it is made in a particular manner, or upon a specified consideration—e. g., upon usury—it is not necessary for the plaintiff to negative the condition; he may leave it to the defendant to set up the facts which bring it within the condition upon which, and upon which alone, it is void. But when a statute makes a deed, or agreement, or other act void, unless made upon a specified consideration, or under specified circumstances, the rule is reversed; the plaintiff must show that the circumstances exist under which alone it can have validity; the defendant, in such case, may rest upon the general prohibition."

This case is cited with approval, and its language adopted by *Mr. Sedgwick*. *Sedgwick's Stat. and Cons. Law*, p. 117. See, also, *Devendorf v. Beardsley*, 23 Barb. 657; *Hatch v. Peet*, *id.* 575; *Otis v. Harrison*, 36 Barb. 210; *Williams v. Babcock*, 25 Barb. 110; *Savage v. Medbury*, 5 Smith (19 N. Y.) 82; *Mahony v. Gunter*, 10 Abbott's P. R. 481. See, also, *Jones v. The Cincinnati, &c. Co.*, 6 Am. L. Reg. p. 718. We express no opinion on this point.

Another question is raised. It is insisted that the special finding of the Court is not properly a part of the record, for the reason that it was not signed by the judge, or ordered to be made part of the record. *Brutton v. Ferguson*, 11 Ind. 814, is cited.

We think this position is correct. A special finding must

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be in writing so that an exception may be taken, and it must be filed with the clerk so that he can enter the special finding, and the exception to it, of record. And, as evidence of its genuineness to the appellate Court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him. We think, when it is signed and filed, it may be regarded as one of the papers in the cause, under the reasoning, and within the spirit of the examples of such given in *Mattlock v. Todd*, 19 Ind. 180. The pleadings in the cause are a part of the record, and they are signed by the counsel respectively. Verdicts are signed; instructions of the Court, made a part of the record, are signed; motions for new trial are signed. Signature is evidence of genuineness and authenticity.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.*

*There was filed herein a petition for a rehearing, by the appellee, containing also an application for a *certiorari*, which was overruled by the Court, and thereupon the following additional opinion was rendered by—

PERKINS, J.—A petition for a rehearing has been filed in this cause, containing also an application for a *certiorari*.

There are two objections to granting a *certiorari*:

1. The alleged defect in the record does not appear upon its face, and the application alleging it is not verified.
2. It is too late to apply for a *certiorari*, certainly as a general rule, after a cause has been decided. 12 Ind. 116; Davis' Dig., tit. *Certiorari*.

Marine policies do not usually contain as particular stipulations as the present on the subject of protests, &c., but where they do, the contract must control. See 3 Sand. (N. Y.) Rep. 36; *Morrell v. Irving, &c. Ins. Co.*, 3 Am. L. Reg. (N. S.) 404; *The Peoria, &c. Co. v. Hall*, id. 417.

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Quære, as to this latter case. Is there not a question as to how far notice to the agent of a fact, if it was not in his power to waive it, could bind the company?

The petition for a rehearing is overruled.

Thomas A. Hendricks and *Oscar B. Hord*, for the appellant.
Daniel S. Major, for the appellee.

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PROMISSORY NOTES—MERCANTILE PAPER.—An instrument of writing in the form following is, in legal effect, a promissory note, and governed by the law merchant:

No. 1.	UNITED STATES OF AMERICA.	No. 1.
STATE OF INDIANA, \$1,000.		CITY OF AURORA, \$1,000.
<i>Ohio and Mississippi Railroad Company.</i>		

The City of *Aurora* acknowledges itself indebted to the *Ohio and Mississippi Railroad Company*, or bearer, in the sum of 1,000 dollars, negotiable and payable at the *North River Bank*, in the City of *New York*, twenty-five years from date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per cent. per annum, payable annually on the first day of *January* at said bank, in the City of *New York*, upon presentation and delivery of the proper coupon hereto attached, signed by the clerk of said city; and at all times the holder shall have a lien on the stock of said city in said company, for which this is received in payment, and may exchange the same for a like amount of said stock at any time before the first declaration of cash dividends, and be substituted as stockholder in place of said city, upon surrender of this bond. This bond is issued in part payment of a subscription of 50,000 dollars by the said city of *Aurora* to the capital stock of

22	186
145	486
23	86
168	91

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the *Ohio and Mississippi Railroad Company*, by order of the Common Council of the city of *Aurora*, on the 28th of *September*, 1850, in pursuance of the eighteenth section of an act granting to the citizens of the town of *Aurora*, in the county of *Dearborn*, a city charter, passed by the General Assembly of the State of *Indiana*, and approved *February* 14th, 1848. Witness the seal of said city of *Aurora*, and the signature of the mayor and clerk of said city, the first day of *January*, 1852.

SOLOMON P. TUMEY,

Mayor of the city of *Aurora*, *Indiana*.

WILL. W. CONWAY, Clerk of the city of *Aurora*, *Indiana*. [SEAL.]

No. 1. *Ohio and Mississippi Railroad subscription.* \$50,000
City of *Aurora*, *Indiana*, will pay the bearer 60 dollars, at the *North River Bank*, in the city of *New York*, on the first day of *January*, 1858, being annual interest on bond No. 1.
\$60.00.

WILL. W. CONWAY, Clerk.

SAME—BONA FIDE HOLDER.—Mercantile paper made void *ab initio*, by statute, is void in the hands of a *bona fide* holder.

CITY—POWER TO SUBSCRIBE STOCK, AND ISSUE BONDS TO A RAILROAD COMPANY.—A municipal corporation can not, without special authority, subscribe stock and issue bonds in payment of it, in a railroad corporation. But such authority may be conferred upon a city, when it is expedient; and when it is given, by statute, in any case, it must be executed as prescribed in the grant, if executed at all. The terms of the grant can not be legally departed from or exceeded.

SAME—BONDS—NOTICE OF POWER.—When bonds, issued by a municipal corporation, bear a reference upon their face to the authority under which they are issued, all persons are bound to take notice of the extent of the powers of the agent who issued them.

RAILROADS—TERMINUS.—A railroad running through, is a railroad running to a city; and if a city is authorized to subscribe stock to a railroad running to it, and it is not made a point in the charter of such road, it can only be made so by subsequent action of the directors of the railroad corporation, and until such action has been

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had, no absolute subscription of stock in such corporation can be made by such city.

SAME—NOTICE.—A railroad corporation, as well as its directors, is chargeable with notice of the time, place, and manner of the location of its road.

PRACTICE IN SUPREME COURT.—A cause will not be reversed, in this Court, for the error of permitting a question to be put and answered, where the answer is harmless; nor where, though not harmless, no motion for a new trial, on account of the error, was interposed.

APPEAL from the *Dearborn* Circuit Court.

PERKINS, J.—This suit was brought in the Court below by *West* and *Torrence*, to recover the amount due on the coupons falling due in 1858, '59, '60, '61, attached to fifty bonds of 1,000 dollars each, issued by the city of *Aurora* in payment of the stock of the *Ohio and Mississippi Railroad Company*, which the mayor of the city had subscribed. The bonds bear date the first day of *January*, 1852, but they were not actually issued till about the first of *June*, 1853, some eighteen months after they bear date.

The following is a copy of one of the bonds and one of the coupons:

No. 1.	UNITED STATES OF AMERICA.	No. 1.
STATE OF INDIANA, \$1,000.		CITY OF AURORA, \$1,000.
<i>Ohio and Mississippi Railroad Company.</i>		

The city of *Aurora* acknowledges itself indebted to the *Ohio and Mississippi Railroad Company*, or bearer, in the sum of 1,000 dollars, negotiable and payable at the *North River Bank*, in the city of *New York*, twenty-five years from date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per cent. per annum, payable annually on the first day of *January*, at said bank, in the city of *New York*, upon presentation and delivery of the proper coupon hereto attached, signed by the clerk of said city; and at

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all times the holder shall have a lien on the stock of said city in said company, for which this is received in payment, and may exchange the same for a like amount of said stock at any time before the first declaration of cash dividends, and be substituted as stockholder in place of said city, upon surrender of this bond. This bond is issued in part payment of a subscription of 50,000 dollars by the said city of *Aurora* to the capital stock of the *Ohio and Mississippi Railroad Company*, by order of the common council of the city of *Aurora*, on the 28th of *September*, 1850, in pursuance of the eighteenth section of an act granting to the citizens of the town of *Aurora*, in the county of *Dearborn*, a city charter, passed by the General Assembly of the State of *Indiana*, and approved *February* 14th, 1848.

Witness the seal of said city of *Aurora*, and the signature [SEAL.] of the mayor and clerk of said city, this first day of *January*, 1852.

SOLOMON P. TUMEY,

Mayor of the City of *Aurora*, *Indiana*.

WILL. W. CONWAY, Clerk of the City of *Aurora*, *Indiana*.

The following is a copy of one of the coupons :

No. 1. OHIO AND MISSISSIPPI RAILROAD SUBSCRIPTION. \$50,000.

City of *Aurora*, *Indiana*, will pay the bearer 60 dollars, at the *North River Bank*, in the City of *New York*, on the first day of *January*, 1858, being annual interest on bond No. 1.

\$60.00.

WILL. W. CONWAY, Clerk.

These bonds purport to be issued under the eighteenth section of the city charter of the City of *Aurora*.

That section is in these words :

"The said City Council, whenever a majority of the qualified voters of said city require it, shall have power, and they are hereby authorized to take stock in any chartered company for making roads to said city, or for watering or light-

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ing said city; *Provided*, that no such stock shall be subscribed on the part of the city until a majority of the qualified voters thereof have signified their assent thereto by expressing upon their ticket at any annual election, that they are in favor of the subscription for such stock by the city council; and to raise funds for the payment of such stock the said city council shall have power and authority to make and sell their bonds under the seal of said corporation, payable in such time as they may deem proper and expedient, and bearing interest at the rate of six per cent. per annum, payable annually, and therein pledge to the holder of such bonds that the stock so taken, with all the dividends thereon accruing, shall be held and firmly bound for the payment of said bonds and accruing interest on the same, and that the interest coupons attached to said bonds shall be received at all times when due, for the payment of all taxes due to said city; the amount of stock subscribed in any one chartered company not to exceed 50,000 dollars."

The city officers having subscribed for 50,000 dollars of the capital stock of the company in *September*, 1850, they did, in *June*, 1853, issue these bonds. They were not sold in the market, or in any way to raise money for the payment of the stock, but they were, on or about the 3d day of *June*, delivered by the city officers to the *Ohio and Mississippi Railroad Company*, in payment of the subscription. The stock was not issued to the city until long afterwards. It was, when issued, in such form that it was afterwards returned to the *Ohio and Mississippi Railroad Company*, and cancelled, and no stock has since been issued to the city.

Among the grounds of defence relied on by the city of *Aurora* was this: "that the *Ohio and Mississippi Railroad Company* was not a chartered company for making a road, or roads, to said city of *Aurora*, or for doing any other act or thing touching said city, or for the promotion of the local

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interest thereof; and the said defendants and the city of *Aurora*, aforesaid, specially aver that on the — day of *September*, 1850, when the said subscription was made by the said city council of the city of *Aurora* for 50,000 dollars of the capital stock of said *Ohio and Mississippi Railroad Company*, the road of said company, that is to say the *Ohio and Mississippi Railroad*, was not located to or through said city, and the said *Ohio and Mississippi Railroad Company* was not on the — day of *September*, 1850, the day upon which said subscription was made, constructing, nor had said company at any time before that day been engaged in the construction of a railroad, or any other road to, or through, or from the said city of *Aurora*, nor was the said company required by their act of incorporation to construct a road to, through, or from said city;" all of which was well known to *Charles W. West*, one of the plaintiffs, who was then, had been before, and continued afterwards to be a member of the board of directors of said *Ohio and Mississippi Railroad Company*.

On the trial the Court charged the jury, among other things, as follows:

"If you believe from the evidence that the plaintiffs purchased the bonds from the railroad company in good faith, and paid a valuable consideration, and without any knowledge on their part of the city of *Aurora* having any objections to the payment of said bonds, or having objections to the manner in which the city of *Aurora* made said bonds, you should find for the plaintiff."

This was excepted to.

It appeared in evidence that the plaintiff, *West*, was a director and active member of the corporation, as alleged in the paragraph of the answer above quoted.

There was judgment below against the city. In examining the case we may first properly ascertain the character of these corporation bonds.

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They are, in legal effect, the promissory notes of the city. It is true, they are under seal, and would not, by strict common law rules, come within the definition of promissory notes; but they are now treated as such. If they had been issued, payable generally, they might not have been governed by the law-merchant in this State. Only bills of exchange, and such notes as are payable at a bank in this State are, by the law of this State, governed by the *lex mercatoria*. 1 Blackf. 81; 13 Ind. 521.

But the bonds or notes in question are payable in *New York*; they are, therefore, as against the maker of them, *New York* contracts; they are governed by the law of *New York*.

This principal of law was settled in *England*, by the case of *Robinson v. Bland*, in 1760, 1 Wm. Black. Rep. 234, 256; S. C. 2 Burr. 1077. In that case *Sir John Bland* drew a bill at *Paris* upon himself, payable in *England*, for money lost at play in *Paris*. It was, in legal effect, his promissory note, executed in *Paris* but payable in *England*. Suit was instituted on the bill in *England*. The question was whether the law of *France* or *England* was to determine the character of the paper. The case was twice argued. On the first argument, *Dennison, J.*, said: "This case and the law upon it are quite new to me. I can form no opinion upon it."

On the second argument, *Lord Mansfield* said: "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom. *Huberus* says, Præl. 1, tit. 3, p. 34, contracts are to be considered according to the place wherein they are to be executed. As, therefore, the bill in the present case is made payable in *England*, it is entirely an English transaction, and to be governed by the local law. *Dennison,*

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J., said: "It is a plain case and must be ruled by the laws of *England*." *Wilmot, J.*, said: "The place where the money is to be paid must guide the law. It is determined as to usurious contracts in *Ireland*. Pr. Chanc. 128. Clearly, therefore, the law of *England* must be the rule, as the money was made payable here." To the same effect in *Indiana*. *The State Bank v. Bowers*, 8 Blackf. 72; *Hunt v. Standart*, 15 Ind. 33; *Rose et al. v. The Park Bank*, 20 Ind. 94; *Butler v. Myer*, 17 Ind. 77.

By the law of *New York*, bonds like those in suit are governed by the law-merchant. This is shown by the statute of *New York* set out in the record, and the decisions of her courts. *Gould v. The Town of Sterling*, 10 Am. L. Reg., and note 2; S. C., 23 N. Y. Court of App. 489, 464; *Bank of Rome v. The Village of Rome*, 19 N. Y. Court of App. 20. See 19 Ind. R. p. 93.

Being mercantile paper, the next question is to what defences is it subject? As a general proposition, it may be laid down that mercantile paper, made void *ab initio*, by statute, is void in the hands of a *bona fide* holder. Story on Bills, § 189. So, such paper, as a general proposition, we take it, can not be enforced, even by a *bona fide* holder, against infants, lunatics, married women, and alien enemies, they not having capacity to bind themselves by such contracts. Story on Bills, § 81 *et seq.* So, it has been held, that where a corporation issued commercial paper, not apparently within the scope of its powers, such paper was void in the hands of a *bona fide* holder, if there could be such. *Smead v. The Indianapolis, &c. Co.*, 11 Ind. 104; *Starin v. Town of Genoa*, 23 N. Y. Rep. 450; *Gould v. The Town of Sterling*, *id.* 459. See, also, 14 Cal. Rep. 367; 16 *id.* 626; 18 *id.* 618; 20 *id.* 108. See *Moran v. Commissioners of Miami Co.*, 2 Black, (U. S.) Rep. 722. But we need not now express an opinion on this point, for the plaintiffs in the case at bar were not, as will

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appear further on, *bona fide* holders of the bonds in suit; so that if these bonds were irregularly issued, the plaintiffs were chargeable with notice thereof. *Aurora* was and is a municipal corporation, and therefore, on general principles of law, could not, without special authority, subscribe stock and issue bonds in payment of it, in a railroad corporation. Grant on Corp. pp. 60, 276, (side pages.) But such authority is proper to be conferred upon a city where it is expedient. And where such special authority is given, by statute, in any case, it must be executed as prescribed in the grant, if executed at all. The terms and conditions of the grant can not legally be departed from or exceeded. In the case of the city of *Aurora* a special authority was given to her, by the section of the charter above quoted, to take stock in a railroad, running to the city, upon a vote of a majority of her qualified voters. The power of the city, then, to take railroad stock, &c., was granted subject to two conditions precedent, viz: the existence of a road running to the city, and a vote, expressed, &c., of a majority of her qualified voters. The bonds in suit bore a reference upon their faces to the authority under which they were issued, and thus put all persons on inquiry as to the extent of the powers of the agent issuing them.

Aurora, then, might take a certain amount of stock and issue bonds, &c., to a certain amount, in and for a railroad running to that municipal corporation, after a vote, &c.

A railroad running through would be a railroad running to the city. *The City of Aurora v. West et al.*, 9 Ind. 74; *Von Hostrup et al. v. The City of Madison*, Dec. Term Sup. Court U. S. 1868.

That city did, in fact, take stock in the *Ohio and Mississippi Railroad Company*, and issue bonds in payment of it. Some of those bonds passed into the hands of the plaintiffs below in this suit. And the questions arise, was the *Ohio and Mississippi Railroad Company* a railroad running to *Aurora*?

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Was the stock taken after a vote as prescribed by the charter? A determination of the city council that such a vote had been taken would probably be sufficient evidence of that fact, at least, to constitute a *prima facie bona fide* purchaser in a given case. *The Evansville, &c. Railroad Company v. The City of Evansville*, 15 Ind. p. 395. In this case, however, it may be questioned whether the city council ever passed upon the point. A majority of those voting may not be a majority of the votes; but we pass this point, and proceed to the other inquiry above propounded, viz: was the *Ohio, &c., Railroad*, a road running to *Aurora*? How is this inquiry to be determined? If *Aurora* had been made a point in the charter of the company, that fact would have been an answer to the question; but it was not. Hence, it could only have been made a road running to *Aurora* by subsequent action of the directors of the corporation; and, till such action had been had, no absolute subscription of stock in the corporation could have been made by the city. Now, the directors of the *Ohio and Mississippi Railroad Company* are constituted, by the charter, the corporation; and the fact appears that, from its origin till after the subscription by *Aurora, West*, one of the plaintiffs, and a partner of the other, was one of the acting directors of the *Ohio, &c. Company*, and thus a part of the corporation; and such a corporation must be chargeable with knowledge of its line of road; hence, in point of law, was necessarily chargeable with notice of the time, place and manner of the location of the road. See *Aspinwall et al. v. Ohio, &c. Company*, 20 Ind. Rep. 492.

In view of this fact, then, that the plaintiffs must be charged with notice, on the question of location, the instruction given by the Court, above quoted, is erroneous, and may have controlled the verdict in the cause. That instruction is erroneous on two grounds:

1. It goes upon the hypothesis that the bonds may have

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been illegally issued, and the plaintiffs *bona fide* holders of them, even though that illegality consisted in issuing the bonds for stock subscribed in a road not running to *Aurora*.

2. It goes upon the hypothesis that the bonds might have been void for illegality of issue, and that fact known to the plaintiffs, and yet the plaintiffs be entitled to recover if they did not know that the people of the city were objecting on that ground.

This instruction was calculated to mislead the jury. The people would be presumed to be objecting.

A point is made as to an error of the Court in allowing an illegal question to be propounded to a witness. Whether the answer to such question should be excepted to as well as the question, to save the error for review in the Supreme Court, we do not decide; but we do decide, that the Supreme Court will not reverse for the error of permitting such question to be put and answered, where the answer is harmless; nor where, though not harmless, no motion for a new trial on account of the error, was interposed. See *The City of Aurora v. Cobb et al.*, 21 Ind. p. 492.

In the case of *Culbertson v. Stanley*, 6 Blackf. 67, *Sullivan, J.*, says: "Nor is it error that the Court erroneously overruled an objection to a leading question, unless the record show that the opposite party was injured by the answer of the witness." See also 18 Ind. 377: "If the witness did not give the answer it was the design of the plaintiff to draw from him, the defendant has no reason to complain."

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

Holman & Haynes, Jer. Sullivan and T. D. Lincoln, for the appellants.

A. Brower, for the appellees.

See note beginning at page 508.

McKinney v. The Ohio and Mississippi R. R. Co.

McKINNEY v. THE OHIO AND MISSISSIPPI RAILROAD CO.

RAILROADS—LIABILITY OF FOR STOCK.—Where a railroad is not securely fenced, the company is liable for stock killed by its cars, without reference to the question of negligence. 1 G. & H. 522.

SAME—RECEIVER.—A railroad company is liable for stock killed by its cars, in such case, although the road is at the time operated by a receiver duly appointed by a competent Court.

APPEAL from the *Dearborn* Common Pleas.

WORDEN, J.—This was an action by the appellant against the railroad company, to recover for stock killed by the cars of the company at a point where the road was not fenced. Trial by the Court; finding and judgment for the defendant; a motion for a new trial being overruled.

It appeared sufficiently that the cattle were killed by the cars of the company, and that the road was not fenced; but the ground of the defence was that the road, at the time the cattle were killed, was being run and operated, not by the company or her servants, but by a receiver appointed by the Circuit Court of the *United States* for the District of *Indiana*.

This defence was held to be invalid in the case of the same *Company v. Fitch*, 20 Ind. 498. There an answer had been filed setting up the appointment of a receiver, &c., and it was held that the answer was bad in not showing sufficiently the appointment of the receiver, and in not filing a copy of the appointment; but the Court say: "Aside from this objection, we do not think the existence of the receiver, conceding him to have possessed the powers usually given to a receiver in chancery, relieved the corporation from liability to suit. The corporation still existed, was the owner of the road, and the law made the corporation liable for stock killed under certain circumstances. The receiver operates the road subject to that liability."

The doctrine contended for by the appellee, "that the ser-

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vants whose negligence is complained of, must be the servants of the company, and under the control of the company, in order to make the company liable," may be safely admitted. The statutory right to recover for stock killed by the cars of a railroad company, the road not being fenced, is not based on the ground of negligence in killing the stock. The corporation is made liable for stock thus killed, without negligence. So that negligence on the part of those operating the road is not an element that is at all essential to a recovery in such case. The statute (1 G. & H. 522) makes railroad companies liable for stock killed by the cars, &c., of the company, without reference to the question of negligence, the road not being securely fenced. This statute contains no exception in favor of companies whose roads may be operated by a receiver instead of the servants of the company. It is in the nature of a police regulation, designed to promote the security of persons and property passing upon the road. The reason and spirit of the law are as applicable to roads operated by a receiver, as to those operated by the servants of the company. There is no legal reason that occurs to us why the corporation could not cause the road to be fenced, although it was being operated by a receiver. A receiver could only have control of the road for the use of the corporation, that is to say, to apply the income to the debts of the corporation.

There being no exception in the statute in favor of corporations whose roads happen to be placed in the hands of a receiver, we see no ground on which such exception could be properly interpolated into it.

But the 4th section of the act of *March, 1863*, (1 G. & H. sup. 187,) which act is set out at large in the case above cited from 23th Ind., provides in express terms that such action may be brought against the railroad, whether the same was being run by the company, or by a lessee, assignee, receiver,

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or other person in the name of such company. It is objected, however, that this section is unconstitutional, as being a special regulation of practice in Courts of justice. It does not seem to us that the objection is well founded, but this question is unimportant, and need not be determined, inasmuch as if the section were stricken out, the plaintiff would be entitled to recover by virtue of the old law.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded for a new trial.

Geo. B. Füch, for the appellant.

Theodore Gazlay and Carter Gazlay, for the appellee.

BENNINGHOOF v. FINNEY et al.

EVIDENCE—SPECIAL CONSTABLE—APPOINTMENT OF.—The statute, 2 G. & H. 607, § 110, requiring the appointment of a special constable, by a justice of the peace, to be noted on the docket of such justice, such appointment can only be proven by the record.

SPECIAL CONSTABLE—JUSTICES OF THE PEACE.—The provisions of the statute requiring justices to note the appointment of special constables on their dockets, and to direct process to them by name, are imperative, and not directory merely.

APPEAL from the *Vanderburg* Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellees, upon the official bond of *Finney* as a justice of the peace. Issue, trial, finding and judgment for the defendants, a new trial having been applied for and denied.

The case made by the complaint is this: The plaintiff recovered a judgment before said *Finney*, as a justice, for 85 dollars and some cents, besides costs, against one *Gastle*. Execution was issued upon the judgment by the justice, and delivered to one *William Barker*, who is alleged to have been appointed by *Finney* as a special constable in the case. *Barker* levied the execution upon a wagon and a yoke of oxen

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as the property of *Gastle*, and took from the latter a delivery bond, for the delivery of the property on the day fixed for the sale thereof. On the day fixed for the sale *Barker* failed to attend, although the property was there ready to be delivered to him, and in consequence of *Barker's* failure to attend the plaintiff failed to collect his judgment.

The gist of the action, it will be seen, was *Barker's* failure to attend at the time and place fixed for the sale of the property.

The case seems to have turned mainly on the question, whether the property was exempt from execution, and if so, whether the judgment debtor had taken the proper steps to obtain the benefit of the exemption.

Error is claimed to have been committed in the admission of improper evidence, offered by the defendants, as to the contents of a schedule of property, the paper itself not being accounted for. But in looking through the evidence we think the finding was right independently of all the evidence that was objected to. There is a fatal defect in the evidence designed to sustain the plaintiff's cause.

We have the following statutory provisions, on which the action is based :

"SEC. 110. Whenever there shall be no constable convenient, and in the opinion of the justice an emergency exists for the immediate services of one, such justice may appoint a special constable to act in a particular cause; and shall note such appointment in such cause on the docket, and shall direct process to him by his name; and such constable so appointed shall discharge the duties, receive the fees, and have the powers in such case appertaining to the office.

"SEC. 111. The justice appointing such constable shall, with his sureties, be liable on his official bond for any neglect of duty or illegal proceeding of such constable in such cause." 2 G. & H. 607-8.

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The transcript of the judgment and proceedings in the case of the appellant against *Gastele*, offered in evidence by the plaintiff does not show that *Finney* appointed *Barker* as special constable at all; and this appointment, being required to be noted on the docket, thus making it matter of record, could only be proven by the record. *Porter v. Byrne*, 10 Ind. 146, 150. There is, it is true, the following statement in the judgment, viz: "*August 25*, summons issued at the request of the plaintiff, and to *William Barker*, D. C. P. T., returnable on," &c. There is also the following statement in the transcript, viz: "Execution issued on 1st day of *October*, 1861, and to *William Barker*, D. C. P. T., 18th *November*, 1861, this execution handed to plaintiff in this cause.

Much liberality ought to be extended to short and informal entries made by justices of the peace, but the above entries wholly fail to show substantially that *Barker* was appointed by the justice as a special constable in that case. The abbreviations, "D. C. P. T.," would seem to imply that *Barker* was a deputy constable of *Perry* township, the township in which the justice resided. But deputy constables are appointed by constables and not by justices of the peace. 1 G. & H. 302.

All that can be implied from what appears in the transcript is that *Barker* was a deputy constable of the township. This view is perhaps strengthened by the fact that the execution in question was directed, not to *Barker* by name, as was required if he had been duly appointed as a special constable by the justice, but "to any constable of *Perry* township." With such a record, and such an execution issued upon it, we think it clear that *Barker* could not have justified, as a special constable, a trespass committed by him in attempting to serve the execution; and if he could not, it is clear that the justice is not liable for his failure to complete the service. The provisions of the statute requiring the jus-

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tice to note the appointment of a special constable on his docket, and to direct process to him by name, are imperative, and should not be construed to be directory merely. They were intended to furnish the person thus appointed with record evidence of his authority to act, and without such evidence of record it seems to us he has no such authority.

Per Curiam.—The judgment below is affirmed, with costs.

Chandler & Hynes, for the appellant.

Lewis C. Stinson, for the appellees.

LANE v. MILLER et al.

STATUTES CONSTRUED—CHANGE OF VENUE.—Where a change of venue is taken from a judge of a Circuit Court, such judge is authorized by the statutes, 2 G. & H. 154–5, to appoint a judge of the Court of Common Pleas to try the cause.

SAME—ACTION—INJURIES BY MILL-DAM.—A party who is injured by the erection of a mill-dam, is not deprived by the statute, 2 G. & H. 310, of his remedy for such injury, by action at common law, unless the damages have been assessed by writ of assessment, and such assessment confirmed by the Court and paid within the year after confirmation.

APPEAL from the *Orange* Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellees, for a nuisance in overflowing the plaintiff's lands by means of a mill-dam. Demurrer to the complaint sustained, and exceptions; final judgment for the defendant. The plaintiff appeals.

Before discussing the principal question involved, we will dispose of a preliminary point made by the appellees. The

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cause appears to have been decided below by the *Hon. David T. Laird* instead of the *Hon. Geo. A. Bicknell*, the judge of the *Orange Circuit Court*, hence the appellees move to dismiss the cause, claiming that the proceedings were *coram non judice* and void. But the record shows that a change of venue was taken from *Judge Bicknell*, and that he appointed *Judge Laird*, who was judge of the Court of Common Pleas of *Orange county*, to try the cause. This was authorized by the statute. 2 G. & H. 154-5. There is evidently nothing in this objection.

The objection made to the complaint is that as the law on the subject of the assessment of damages has given a person whose lands are injured by means of the erection of a mill-dam a remedy by writ of assessment of damages, he is confined to that remedy and can not resort to his action at common law. In *Snowdon v. Wilas*, 19 Ind. p. 10, a query is raised whether he should not be confined to the statutory remedy, but the point has never been thus decided by this Court. In *Summy v. Mulford*, 5 Blackf. 202, the point, after full examination, was ruled the other way. There the statute authorized any person who might be damaged by the overflowing of the water to obtain a writ of *ad quod damnum* in the same manner as was directed in case of persons wishing to build a mill, &c.

The following observations of the Court in that case are equally applicable here: "Some statutes are, from their being in affirmative terms, called affirmative statutes; others obtain the name of negative statutes because they are penned in negative terms. It is a maxim of law, that an affirmative statute does not take away the common law, and a party may make his election to proceed upon the statute or at common law. Bac. Abr., tit. Statute, (G); 2 Burr. 303. The statute under consideration contains nothing in the terms of it repugnant to the right of the plaintiff to resort to the remedy

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given him by the common law. He may therefore resort to it, for to be deprived by statute of a remedy which he possessed before the enactment of the statute, its terms should be express, or so clearly repugnant to the exercise of it, as to imply a negative."

In examining the present statute on the subject of the assessment of damages (2 G. & H. 310) we find nothing inconsistent with the right of a party who is injured by the erection of a dam, (no proceedings having been taken to assess the damages by writ of assessment,) to resort to his common law remedy, by action. On the contrary the common law remedy is, as we think, recognized as continuing to exist. The ninth clause of section 684 authorizes "any person injured in any manner by a mill-dam already built, to have the damages assessed, or the dam declared a nuisance, as the case may require," by means of the writ of assessment. Sec. 703 provides that "any assessment of damages confirmed by the Court, and paid within a year after confirmation shall bar a recovery for the same in any other action." This section seems clearly to contemplate that a party injured may resort to his common law action, and provides what proceedings under the writ of assessment of damages shall bear such action.

We are of opinion that the objection to the complaint is not well taken.

Per Curiam.—The judgment is reversed, with costs.

R. Crawford and A. J. Simpson, for the appellant.

J. Collins, Thos. L. Collins and A. B. Collins, for the appellees.

 Sturgeon et al. v. Hitchens.

STURGEON *et al.* v. HITCHENS.

JURISDICTION—JUSTICES OF THE PEACE.—In actions against tenants unlawfully holding over, and in forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount.

CONSTITUTIONAL LAW.—The 12th section of the act entitled “an act concerning the unlawful detention of lands, and the recovery thereof,” 2 G. & H. 630, is within the title of said act.

NEW TRIAL.—Action for the unlawful detention of real estate, trial by jury, and verdict for the plaintiff for 51 dollars damages. The cause was tried a second time by the Court, and the defendants had judgment. In the meantime the defendants surrendered the possession to the plaintiff. A third trial was afterwards had in the absence of the defendants and their counsel, and 500 dollars was recovered against them. After the close of the term the defendants filed a complaint for a new trial, sworn to, in which it was shown that the trial of the cause was had in their absence, and in the absence of their attorney, who had gone to the war; that they did not discover, until after the close of the term, that the cause had been tried in the absence of their attorney; that they had a meritorious defence; that reasonable ground existed for belief on their part that their cause would be well attended to without their personal presence, and that they were excusable in being absent.

Held, that under the circumstances of the case the new trial should have been granted.

APPEAL from the *Switzerland* Circuit Court.

PERKINS, J.—On the 23d day of *April*, 1860, *Hitchens* proceeded before a justice of the peace against *Sturgeon* and *Ricketts*, for unlawful detention of real estate. The complaint was as follows:

“ <i>Emanuel Hitchens</i> ,	} Court of <i>John G. Anderson, Esq.</i> , a justice of the peace of <i>Switzerland</i> county.
v.	
<i>George Sturgeon</i> , and	
<i>John Ricketts</i> .	

“*Emanuel Hitchens*, plaintiff, complains of *George Sturgeon*

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and *John Ricketts*, defendants, and says that on or about the 9th day of *January*, 1860, he was in the lawful and peaceable possession of a tract of land situate in *Switzerland* county, on *Plumb* creek, formerly owned and occupied by *Francis Schoonover*, on which tract, so possessed by the plaintiff, there was and is a grist mill, and saw mill, and mill race, and ground appurtenant for the use of said mills; and that the defendants, on the day and year last aforesaid, did make unlawful entry into and upon said mill race, and grist mill and saw mill, and the ground appurtenant thereto; that the plaintiff hath the right of possession thereof, and that the defendants unlawfully detain the possession thereof from the plaintiff. Plaintiff prays judgment of restitution, and damages 700 dollars.

J. DUMONT, for the plaintiff."

No objection, by motion or demurrer, was made to this complaint, and perhaps it may be held sufficient after verdict; though we decide nothing as to this. See *O'Connell v. Gillespie*, 17 Ind. 459.

There was a trial before the justice, and the plaintiff obtained a judgment for 51 dollars damages, and for restitution, &c. This was on the 1st day of *April*, 1860.

The cause went to the Circuit Court, but how, or on whose application, the justice does not state. At the *October* term, 1860, the cause was tried in the Circuit Court and there was judgment for the defendants.

The cause was appealed to the Supreme Court where the judgment of the Circuit Court was reversed. *Hitchens v. Ricketts et al.*, 17 Ind. 625.

At the *May* term, 1862, the cause having been sent back from the Supreme Court, again appeared upon the docket of the Circuit Court, and was continued.

On the 6th day of the *November* term, 1862, being the 15th

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day of that month, the cause was tried by a jury, and the following verdict returned:

"We, the jury, find the defendants guilty, and assess the plaintiff's damages at 500 dollars."

Thereupon the Court rendered this judgment: "It is considered by the Court that the plaintiff recover of the defendants the sum of 500 dollars in damages in form aforesaid assessed, and found, as also plaintiff's costs and charges herein expended taxed at," &c.

The record of this trial recites that the parties appeared; that is, it states thus: come the parties, &c.

The verdict and judgment were limited to damages because the possession had been surrendered pending the suit. We see no error in this. Still, it is safest to follow the form prescribed by the statute in these cases. 2 G. & H. p. 615. But see 2 G. & H. 283, as to judgment for damages only. It is urged that the amount of damages is beyond the jurisdiction of a justice of the peace; but this proceeding is a special one, given by statute to justices of the peace, and without limit of amount as to jurisdiction. 2 G. & H. 680. It is claimed that the 12th section of the statute mentioned is inoperative, because not embraced by the title. The title is, "an act concerning the unlawful detention of lands and the recovery thereof." We think this title comprehensive enough to embrace proceedings against tenants unlawfully holding over, and in forcible entry and detainer.

In vacation, on the 11th day of *December*, 1862, the defendants filed in the clerk's office a complaint for a new trial. The complaint was sworn to. At the next term, a demurrer was sustained to the complaint and it was dismissed. An appeal was taken to this Court.

Our code provides that a new trial may be granted on account of, among other causes, any "irregularity in the proceedings of the Court, jury, or prevailing party, or any order

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of Court, or abuse of discretion, by which the party was prevented from having a fair trial." 2 G. & H. 212. And, if the fact justifying the new trial is not discovered till after the term, the application may be made after the term. In this case the fact occurring, claimed to justify a new trial, was the trial of the cause in the absence of the defendants and their attorney, who had gone to the war, they not discovering till after the term that the cause had been tried in the absence of the attorney. The complaint sworn to shows merits in the defence, and shows that reasonable ground existed for belief on the part of the defendants that their cause would be well attended to without their personal presence, and they were excusable in being absent. Taking all the surroundings of the case, we think a new trial should be granted. The cause was once tried by a jury who gave the plaintiff 51 dollars in damages. The second time it was tried by the Court, and the defendants had judgment. In the meantime the defendants surrendered the possession to the plaintiff. Afterwards a trial was had in the absence of defendants and their counsel, and 500 dollars recovered against them. We think the rulings in *Graves v. Rayle*, 19 Ind. 83; (in which case it may be observed, as the fact does not appear in the report, *Graves* was a resident of *Montgomery* county;) *Frazier v. Williams*, 18 *id.* 416; *Hannah v. The Indiana*, *fc.*, *id.* 431, sanction a new trial in this case.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

A. C. Downey, for the appellants.

John Dumont, for the appellee.

Jones et al. v. Reeder.

JONES et al. v. REEDER.

FRAUDULENT CONVEYANCE—CREDITORS.—*A* owned a tract of land, and with intent to defraud his creditors, conveyed it, without consideration, to *B*, who, to aid *A* in accomplishing his fraud, conveyed it, without consideration, to *C*. *C* mortgaged the land to the sinking fund for a loan of 500 dollars, which he received; *C* was a party to the purpose of *A* to defraud his creditors. The State received the mortgage made to the sinking fund, and made the loan in good faith. All of said conveyances, except the mortgage to the sinking fund, were set aside by a decree of the proper Court, and the land ordered to be sold, subject to said mortgage, for the benefit of the creditors of *A*. The land did not sell for enough to pay them. Suit was then brought against *C*, to compel him to account for and pay over to *A*'s creditors the 500 dollars obtained by the said mortgage.

Held, that *C* was entitled to the money as against *A*, but held it in trust for the creditors of *A*, to whom he was liable to account and pay it over.

APPEAL from the *Howard* Circuit Court.

PERKINS, J.—The complaint in this case shows that *John D. Jones & Co.* recovered a judgment in the *Howard* Circuit Court, at the *November* term, 1856, against *Jonathan Reeder*, for over 1,600 dollars.

It further shows that, at that time, said *Jonathan* owned a tract of land in *Madison* county, *Indiana*, and that, to defraud his creditors, he conveyed it without consideration to one *Ring*, who, to aid *Jonathan* in accomplishing his fraud, conveyed the same, without consideration, to *Joseph H. Reeder*, who mortgaged said tract of land to the sinking fund for a loan of 500 dollars, which he received, all of which acts were done by said *Joseph* as a party to the purpose of *Jonathan* to defraud his creditors. The State, however, received the sink-

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ing fund mortgage and made the loan of 500 dollars in good faith.

The complaint further shows that all the foregoing conveyances, except the mortgage to the sinking fund, were adjudged void by the *Madison* Circuit Court, and the land in question ordered to be sold for the benefit of *Jonathan's* creditors, subject to the mortgage to the fund above mentioned; that the sale took place but failed to produce sufficient to pay the creditors, and this suit is now brought against *Joseph H. Reeder* to compel him to account for and pay over to *Jonathan's* creditors the 500 dollars he obtained by mortgaging *Jonathan's* land, held by him, *Joseph*, fraudulently, and without any consideration paid for it.

The Court below sustained a demurrer to the complaint on the ground of want of sufficient facts. We think the Court erred. We think the complaint makes a case against *Joseph* for an accounting and payment over of the money. He holds it absolutely as against *Jonathan*, but in trust as to the creditors of *Jonathan*. *Patridge v. Gopp*, 1 Eden. 163; *Ames v. Blunt*, 5 Paige 13; 1 Story's Eq., §§ 365, 368, 438, and notes; *Simpson v. Gowdy et al.*, 19 Ind. 292, and cases there cited.

The question in this complaint was not embraced in the former suit.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded with instructions to overrule the demurrer.

Martindale & Grubbs, for the appellants.

Lindsey & Davis, for the appellee.

Dale v. Moffitt.

DALE v. MOFFITT.

ACTION—PROMISSORY NOTE.—*A* made his note payable to *B*, and *C* and *D* indorsed it. *B* sued *C* and *D*, as joint makers of the note. The evidence showed conclusively that *C* and *D* placed their names on the note, not as makers, but as indorsers. *Held*, that *C* and *D* were not liable in the action.

APPEAL from the *Hamilton Common Pleas*.

DAVISON, J.—*Silas Moffitt*, who was the plaintiff, brought an action against *Samuel Dale* and *William Holeman*, alleging in his complaint that the "President and Directors of the *Peru and Indianapolis Railroad Company*, on the 12th of *February*, 1851, issued their promissory note, payable to the plaintiff at three days, for 200 dollars, at 12 per cent. interest, signed by *John Burk*, President, and attested by *John T. Cox*, Secretary; that *Dale* and *Holeman*, the defendants, at the day of the date of the note, signed the same, by indorsing their names on the back hereof, which note and indorsements thereon read thus :

"\$200. Upon demand or within three days thereafter, for value received, the President and Directors of the *Peru and Indianapolis Railroad Company* promise to pay *Silas Moffitt* or order 200 dollars, with interest at the rate of 12 per centum per annum until paid, payable without defalcation or default, and recoverable without any relief whatever from the appraisement laws. JOHN BURK, President.

"Attest: JOHN T. COX, Secretary.

"Indorsed, *Samuel Dale*, *William Holeman*."

There is also an indorsement of a payment thereon as follows: "Interest calculated and paid up to the 12th of *February*, 1853."

It is further averred that the note is due and wholly unpaid; that the railroad company is notoriously insolvent, and that
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the defendants, though often requested, have refused to pay, &c. *Dale*, one of the defendants, answered:

1. By a denial.

2. That he indorsed the note in blank, in the ordinary character of an indorser merely, and not with any understanding or intention of becoming liable thereon as maker, but only in case the railroad company, legal diligence having been used by the holder of the note to collect it from her, should fail to pay, &c. The plaintiff demurred to the second paragraph; but the demurrer was overruled, and he replied in denial, &c.

The Court tried the issues and found for the plaintiff for 428 dollars. Motion for a new trial denied and judgment. The only question to settle is, was the finding sustained by the evidence?

We have decided that, "where a promissory note is indorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing on the note." *Vore v. Hurst*, 13 Ind. 551. But "where a party places his name on the back of a note, creating a liability in favor of the payee, the presumption is that he intends to assume the liability of an indorser, and nothing more. This presumption, however, may be controlled by parol evidence, showing that he intended to assume the liability of a maker, in which case he will be regarded as a joint maker." *Sill v. Leslie*, 16 Ind. 236; *McGaughey v. Elliott*, 18 Ind. 121; *Drake v. Markle*, 21 Ind. 433. Here the payee did not indorse the note, and the defendants, having written their names on the back of it, the only question to settle is, has the presumption that they signed as indorsers been rebutted by the evidence? In the absence of any extrinsic proofs in the case, the finding should have been in favor of the defendants; but the evidence is upon the record, is not conflicting, and shows con-

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clusively that the defendants placed their names on the note, not as makers, but as indorsers. And the result is, having been sued as makers, they are not liable in this action.

Per Curiam.—The judgment is reversed, with costs.

Stone & Moss, for the appellant.

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22	115
186	500

APPEAL—COSTS.—An administrator who is sued before a justice of the peace on a claim against him in his fiduciary capacity, has a right, under § 64, 2 G. & H. p. 593, to appeal from the judgment rendered, though the justice had no jurisdiction of the cause; and the Court to which he appeals, in deciding the question of jurisdiction in his favor, should render judgment against the plaintiff for costs.

APPEAL from the *Daviess* Circuit Court.

DAVISON, J.—The appellee, as executrix of *Henry Fuller*, deceased, sued the appellant, as administrator of *Andrew Palmer*, deceased, before a justice of the peace, upon the following account, which was filed as the cause of action, viz :

Josiah Palmer, administrator of *Andrew Palmer*, deceased, to *Catherine Fuller*, executrix of *Henry Fuller*, deceased, Dr.

<i>February 3, 1857</i> , to making rails	\$7 75
Six years interest.....	2 77

 \$10 52

The justice gave judgment in favor of the executrix, who was the plaintiff, for 7 dollars and 75 cents, and the defend-

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ant appealed. In the Circuit Court, to which the appeal was taken, "the Court ordered the cause to be stricken from the docket, for the reason that it had no jurisdiction to try the merits of the action, and rendered judgment against the defendant for all costs which had accrued in said Court." To this ruling the defendant excepted. It is conceded that the claim upon which the suit is founded, being against an administrator in his fiduciary character, the justice had no jurisdiction of the cause. Still the defendant, judgment having been rendered against him, had a right to appeal. 2 R. S., G. & H., p. 501, § 62; *id.* p. 593, § 64. And the Court in which the appeal is pending must adjudge the point of jurisdiction. In this instance such adjudication resulted in favor of the defendant; he was the prevailing party, and it seems "reasonable and proper that he recover a judgment for his costs." *Dixon v. Hill*, 8 Ind. 149.

We are of opinion that the Circuit Court, in rendering judgment against the defendant for costs, committed an error.

Per Curiam.—The judgment is reversed, with directions to the Court below to dismiss the suit at the costs of the plaintiff. Costs here against the appellee.

J. W. Burton, for the appellant.

R. A. Clements, Jr., for the appellee.

THE STATE ex rel. SATTERLEE et al. v. PIERCE et al.; SAME ex rel.
TUTTLE v. SAME.

PRACTICE—REFORMING JUDGMENTS.—Judgments were rendered against a sheriff and his sureties on his official bond. It was not ordered, in the judgments, that they should be executed without

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any relief from appraisement laws, as might have been done, according to section 1 of an act approved *December 21st*, 1858, and section 381 of the code, 2 G. & H. p. 220. After the lapse of one year, but within three years from the date of their recovery, proceedings were instituted in which rehearings were sought by the plaintiffs therein, for the purpose of reforming the same so far as to have them so entered as to be collectable without relief. No excuse or reason was given for the failure to have the judgments rendered in accordance with said statutes; and no copy of the records in said cases were filed with the complaints. Demurrers to the complaints were sustained.

- Held*, 1. That the plaintiffs, so far as appeared from the complaints, by failure to take the judgments in the form they might have done, under said statutes, waived any right to judgments in forms different from those entered.
2. That in a suit upon a judgment a transcript thereof must be filed with the complaint.

APPEAL from the *Lake* Circuit Court.

HANNA, J.—These cases depend upon the same point, and are against the same defendants.

It is averred that judgments were recovered against *Pierce* and sureties on his official bond as sheriff of the county of *Lake*, the dates of which are given. After the expiration of one year from such recoveries, but within three years, this proceeding was instituted, in which rehearings are sought by the plaintiffs in said judgments for the alleged purpose of reforming said judgments so far as to have them so entered as to be collectable without regard to the valuation laws of the State. It is averred that, as entered, said judgments are in the ordinary form, but that under statutes quoted the plaintiffs were entitled to judgments in the form now sought. No excuse or reason is given for the failure to have the judgments rendered as now prayed, in accordance with said stat-

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utes. No copy of the records in said cases is filed with the complaints.

The complaints were demurred to and the demurrers sustained.

The plaintiffs, so far as appears from the complaints, waived any right to judgments in forms different from those entered by failing to take them in such form as they might have done under the statutes. There may have been a valid excuse for such failure, but, if so, it appears to us it should be shown. It has been repeatedly held that, under the statute, in a suit upon a judgment, a transcript thereof must accompany the complaint. We do not see but that the reason for the rule is as strong and applies as well to proceedings of this character. We have held that to present rulings on demurrers no bill of exceptions is necessary. Under that decision the records, as made by the plaintiffs in these cases, would not contain the original judgments and record proceedings sought to be reformed. It will not do therefore to say that, as these proceedings were in the same Court, that Court might inspect its own records. That would not bring it before us for our examination. The safe rule is to require all that the Court below is required to pass upon to go into the record in such cases.

Per Curiam.—The judgment below is affirmed, with costs.

Bradley & Woodward, for the appellants.

ALLEN v. WELLS.

STATUTES CONSTRUED—COSTS.—Action by *A* against *B* for trespass in entering upon lands, and cutting and removing timber. *B* answered by, 1. A denial. 2. That he was the owner, &c., of the lands

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described in the complaint. *A* replied by a denial; and accompanied his reply with an affidavit that title to land was in issue, and a motion that the case be transferred to the Circuit Court. The motion was granted. The case was tried in the latter Court, and a judgment, on verdict, rendered in favor of *A*. *B* made a motion to tax all the costs which had accrued in the Common Pleas, except the costs of the summons and its service, against *A*. This motion was overruled, except as to the costs occasioned by the transfer. *B* appealed, and insisted that his motion should have been sustained.

Held, that section 11, 2 G. & H. p. 22, should be construed to give the Circuit Court some latitude of discretion in each case that may arise under the clause thereof wherein the word "may" occurs; and that, so far as appeared from the record, there was no abuse of a sound discretion, in the judgment as to costs, given by that Court.

APPEAL from the *Daviess* Circuit Court.

HANNA, J.—*Wells* sued *Allen* in the Common Pleas for trespass in entering upon lands, and cutting and removing timber.

Answer: 1. Denial. 2. That defendant was the owner, &c., of the lands described in the complaint. Reply in denial, and accompanied with an affidavit that title to land was in issue, and motion that the case be transferred to the Circuit Court. The case was so transferred. Trial in the Circuit Court, verdict and judgment for the plaintiff for 8 dollars and part of the costs. On motion of the defendant a judgment was rendered against the plaintiff for the costs occasioned by the transfer. The defendant appealed, and insists that all costs that accrued in the Common Pleas, "except the summons and its service," should have been assessed against the plaintiff, as moved for by the defendant, in pursuance of the statute. 2 G. & H. § 11, p. 22. By this section it is provided that, "when it appears upon the face of the complaint or by

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other legitimate pleadings, verified by affidavit, that the title to real estate is in issue," the case shall be transferred, &c.

It did not appear from the face of the complaint that the title to real estate was in issue. It is assumed in argument that it so appeared, because the plaintiff averred therein that he was the owner of the lands upon which the alleged trespass was committed. But it has been decided that the word issue has a technical legal meaning as here used. *Holliday v. Spencer*, 7 Ind. 632. It is evident that the suit was, in the case at bar, for cutting and carrying away the timber, and so far as the complaint shows this was the point in dispute, or issue, which the complainant intended to raise. The defendant avoided that issue by saying that he was the owner of the land, but his pleadings were not verified. This answer was denied and the reply verified.

The pleading thus filed by the defendant should have been verified, so as to authorize the Court to transfer the case, unless a state of facts had existed, and been pleaded by the plaintiff in reply, admitting the title in the defendant; but still entitling the plaintiff to his action for the alleged trespass. Whether such facts might have existed, we need not determine, as they could not have been pleaded by the plaintiff if they did, because such reply would have been a departure—the plaintiff having alleged in the complaint that he was the owner of said lands. We think, then, that in the case at bar, to have brought the same within the meaning of the statute quoted, the pleadings of the defendant should have been verified. As this was not done it may be possible that the Common Pleas should not have ordered the transfer of the case to the Circuit Court; but upon this point the Circuit Court made no order, because the section of the statute above quoted from provides that, "the decision of the Common Pleas ordering the transfer shall be final, but the Circuit Court may tax all costs made in the former Court, except

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the summons and its service, to the party procuring such transfer without sufficient cause." If we are correct in the views above expressed, it would seem to follow that the plaintiff had procured the transfer without sufficient cause, for he should have taken the proper steps to get rid of the pleadings of the defendant which were thus insufficient, unless verified as required, and should not have proceeded as he did. But having thus proceeded and obtained an order which the statute provides shall be final, what was the duty of the Circuit Court as to the costs? Had that Court a discretion to tax the costs made in the Common Pleas against either party, or should the word "may," as used in this statute be construed as equivalent to "shall." In that part of said section immediately preceding the portion last above quoted, this language occurs: "If the cause of transfer appear in the complaint, the plaintiff shall pay all costs in the Common Pleas, except the summons and its service." Why the use of these two words, which, ordinarily, have a different meaning, if, in each instance, the imperative duty was intended to be devolved upon the Court of taxing the costs in the same way under each distinct set of circumstances?

We are inclined to the belief that a just construction of this section would give the Court some latitude of discretion in deciding each case that might arise under the clause where the word "may" occurs. If we are correct in this, then, we can not disturb the judgment herein, for we do not perceive that there was any abuse of a sound discretion, so far as the record shows the facts.

Per Curiam.—The judgment is affirmed, with costs.

J. W. Burton, for the appellant.

R. A. Clements, Jr., for the appellee.

Brown's Administrators v. Bragg.

BROWN'S ADMINISTRATORS v. BRAGG.

LANDLORD AND TENANT—FORFEITURE OF LEASEHOLD.—The failure of a tenant to pay rent will not work a forfeiture of his estate, unless it is so expressed in the lease or agreement.

SAME—STATUTES CONSTRUED.—The words "all general tenancies," in section 2, 2 G. & H. p. 359, mean such tenancies only as are not fixed and made certain in point of duration, by the agreement of the parties.

SAME.—*Scmble*, that the words "or for a shorter period," in the same section, embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties, as less than a year.

ESTATES FOR YEARS.—Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great.

APPEAL from the *Madison* Circuit Court.

WORDEN, J.—On the 1st of *April*, 1859, *Brown* let to *Bragg* certain real estate, to be held by the latter for the term of one year from that date; for which *Bragg* was to pay, as rent, the sum of 450 dollars, to be paid quarterly, at times specified in the instrument of writing creating the tenancy executed between the parties. On the 1st of *December*, 1859, a quarter's rent being due and unpaid, *Brown* served on *Bragg* a notice to quit the premises at the expiration of ten days, unless the rent in arrear should be paid within that time.

Bragg failing to pay the rent or quit the premises, this action was brought by the representatives of the lessor to recover possession. The suit was brought before the expiration of the term.

The Court below held, on the facts above stated, that the plaintiffs were not entitled to recover, and we think the decision was in accordance with the law of the case.

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We suppose that, independently of any statutory provisions, the proposition that the failure to pay the rent due, did not work a forfeiture of the estate of the tenant, is too clear to require the citation of any authorities in its support. In order that a failure to pay rent should work a forfeiture, it should be so expressed in the lease or agreement of the parties, which was not done in the case before us. As well might a man who sells a horse to be paid for in the future, claim to recover him back on failure of the purchaser to pay according to his stipulation, as the lessor of real estate to recover it from his tenant because of his failure to pay rent, there being no stipulation that such failure should work a forfeiture.

But we have the following statutory provision, which is claimed by the appellants to be applicable to the case before us. "If a tenant at will, or from year to year, or for a shorter period, neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, unless such rent shall be paid at the expiration of said ten days." 2 G. & H. p. 359, § 4.

The case before us does not come within any of the clauses of the statute above set out. It is clearly not a tenancy at will, nor for a shorter period than a year; and it seems to be equally clear that it is not a tenancy from year to year. The legislature, in the second section of the act above cited, have provided what shall be deemed tenancies from year to year, viz: "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord." By the words "*all general tenancies*," we think it clear that the legislature meant such tenancies only as were not fixed and made certain in point of duration by the agreement of the parties. This is apparent from several considerations. Where lands are demised for a definite term, no notice to quit is necessary in order to terminate the tenancy.

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See cases in Perk. Dig. p. 350, § 5. Yet the legislature have provided for terminating tenancies from year to year by three months' notice to quit. Section 3. It would be an absurdity to suppose the legislature intended to change tenancies for a fixed period, whether for one year, or more, or less, into tenancies from year to year, and then enable the landlord to terminate them by three months' notice to quit. The statute seems to be merely declaratory of the common law on the subject. Says Chancellor *Kent*, "estates at will, in the strict sense, have become almost extinguished, under the operation of judicial decisions. Lord *Mansfield* observed that an infinite quantity of land was holden in England without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and where no certain term is agreed on, they are construed to be tenancies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. The language of the books now is that a tenancy at will arises from grant or contract, and that general tenancies are constructively taken to be tenancies from year to year." 4 Kent Com. § 10, p. 128.

In the case before us, the tenancy, by the agreement of the parties, was for a year, neither more nor less. Hence it is wholly unnecessary to determine what is meant by the words "or for a shorter period," in the section of the statute above quoted; but we doubt whether they should be construed to embrace a tenancy for a fixed and definite period. The interpretation that presents itself as the most reasonable is, that they embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties as less than a year. But on this point nothing is decided.

The lease in the case before us, created an estate which the law defines to be an estate for years. Such would also have been its character had it been less than a year in duration.

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"Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years." 2 Shars. Blackstone, p. 142. "Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great." 1 Washburn on Real Estate, p. 291.

The defendant being a tenant for years, and not at will, or from year to year, or for a shorter period, it was not competent for the lessor to terminate the tenancy before the expiration of the term, on the ground of failure to pay the stipulated rent.

Per Curiam.—The judgment below is affirmed, with costs.
W. R. Pierce and H. D. Thompson, for the appellants.

HALBERT *et al.* v. THE STATE *ex rel.* BOARD OF COMMISSIONERS
 OF MARTIN COUNTY.

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COUNTY TREASURER—DUTY OF—BREACH OF HIS BOND.—Under sections 2, 3, and 13, 2 G. & H. p. 640, and sections 123, 125, and 127, 1 G. & H. p. 68, it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach of his bond, conditioned for the faithful performance of his duties.

PUBLIC OFFICER—LIABILITY OF FOR MONEYS.—A public officer who is required to give bond for the proper payment of money that may come into his hands, as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but his liability is fixed by his bond, and the fact that the money

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was stolen from him without his fault, does not release him from his obligation to make such payment.

COUNTY TREASURER—BOARD OF COMMISSIONERS HAVE NO POWER OVER, TO DIRECT WHERE FUNDS OF STATE AND COUNTY SHALL BE KEPT.—A county treasurer is an officer who acts on his own responsibility, and independently of the Board of Commissioners of the county, so far as the keeping of the funds of the State and county is concerned. He is the proper custodian of the funds, and the Board of Commissioners have no legal authority to direct him where, or in what manner, the funds shall be kept.

HANNA, J., dissenting.

APPEAL from the *Martin* Circuit Court.

WORDEN, J.—This was an action against *Halbert* and his sureties on his official bond as treasurer of *Martin* county. The condition of the bond was that *Halbert* should “faithfully and impartially discharge his duties as treasurer of *Martin* county, and pay over all moneys according to law that might come into his hands as such treasurer.”

There were three breaches assigned.

1st. That *Halbert* received, while in office, 3000 dollars belonging to the common school fund, which he failed to pay over.

2d. That he received 3000 dollars on account of township taxes, which he failed to pay over.

3d. That he received funds belonging to said county, arising from various sources, to the amount of 3000 dollars, which he failed to pay over.

The general denial was filed, with an agreement that all matters of defence, and of reply thereto, might be given in evidence in the same manner as if pleaded.

The cause was submitted to the Court for trial on the following agreed statement of the facts:

“That the defendant, *Thomas Halbert*, was, at the *October* election in the year A. D. 1859, elected treasurer of the county

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of *Martin* aforesaid, for the term of two years from the 5th day of *November*, 1859. The said *Thomas Halbert* as principal, and the other defendants as sureties, executed a bond to the State of *Indiana*, conditioned for the faithful performance of said *Halbert's* duties as treasurer aforesaid, as alleged in the plaintiff's complaint, which bond on the day and year last aforesaid, was approved by the Board of Commissioners aforesaid, and said *Halbert* then and there entered upon the duties of said office, and continued therein until his successor was duly elected and qualified; that there came into his hands during his said term of office as such treasurer as aforesaid, from divers sources, the sum of 2186 dollars and 26 cents, which he did not pay over to the persons authorized by law to receive the same, or to his successor in office; that at the *December* term, A. D. 1859, of the Board of Commissioners of said county, to wit: on the 8th day of *December*, 1859, the following order was made by said Board and entered on their record, to wit: 'Ordered, that *James C. O'Brien* be allowed the sum of 172 dollars for a safe furnished the treasurer's office;' that at the *March* term, A. D. 1861, of said Board of Commissioners the following order was made by said Board and entered on their record, to wit: 'Comes now *Thomas Halbert*, treasurer of *Martin* county, and files his written statement, to wit: That there was a clerical irregularity and omission in a certain order of this Court, made at the *December* term, 1859, in the matter of the purchase of the safe, for the safe-keeping of the funds, &c., of the treasury, and other orders in the premises, and asks that the record thereof be corrected by making an entry now for then of the several orders in the premises, and after an examination of said orders as recorded at said *December* term, 1859, and hearing evidence therein, the Board being fully advised in the premises, it is ordered that the following entry be made now for then, to wit: It appearing to the satisfaction

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of the Board that the funds belonging to the county treasury are constantly in danger of loss by robbers, fire, or other casualties; it is therefore ordered by the Board that a safe be purchased for the use of the treasurer of said county; and now comes *James C. O'Brien* and proposes to sell to said Commissioners, for the uses aforesaid, a certain safe, now exhibited to them, and said safe being deemed sufficient by said Board, is now purchased in open session of said *O'Brien* for the uses and purposes aforesaid, and said treasurer is now ordered and directed by the Board to deposit and keep the moneys, orders, and valuable papers and books of the treasury of said county, in the safe aforesaid; and that said *O'Brien* be allowed the sum of 172 dollars therefor; that at the *December* term, 1859, and from thence hitherto, the office of treasurer of said county, as provided by said Commissioners, was kept in a room on the first floor of the court house in said county, which room had one door of wood, fastened by an ordinary lock, and two windows with loose wooden shutters on the inside, which were fastened by cross bars across the middle of the shutter, no other office having been provided for said treasurer by said Board; that from said *December* term, 1859, until the 12th day of *December*, 1860, said *Halbert*, as treasurer aforesaid, kept and deposited the moneys, papers, and books, belonging to the treasury of said county, in said safe, which was kept properly locked and situated in said room; that on the evening of said 12th day of *December*, 1860, at the close of business hours, the said *Halbert*, being treasurer as aforesaid, deposited in said safe the sum of 1958 dollars and 58 cents, being money in his hands received by him as treasurer aforesaid; that said *Halbert*, upon depositing said money on said evening in said safe, locked the same properly and removed the key, fastened the shutters of the windows, locked the door of said office, and took the keys of said safe and office doors, home with

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him; that some time during the night of said 12th day of *December*, 1860, said office, without the knowledge or consent of said *Halbert*, was burglariously and feloniously broken open and entered by some person or persons unknown, and said safe blown open by means of powder, and the moneys therein aforesaid deposited, feloniously stolen and carried away by said unknown person or persons, and no portion of said moneys was ever thereafter recovered by said *Halbert*. Now it is agreed that if, upon the foregoing facts, the Court is of the opinion that said *Halbert* is liable to pay the moneys so feloniously stolen as aforesaid, the Court shall find in favor of the plaintiff in the sum of 2186 dollars and 26 cents, and the interest and penalty prescribed by law; if the Court is of the opinion that *Halbert* is not liable to pay said stolen moneys, the Court shall find for the plaintiff in the sum of 227 dollars and 68 cents; interest on the amount found to be due to be computed from *November 15th*, 1861."

The Court found for the plaintiff the larger amount specified in the agreement, with interest and penalty; and having overruled a motion for a new trial, rendered judgment.

The defendants appeal.

It is not claimed that any part of the moneys stolen was the money of the State, and the question presented by the record is, whether the defendants are liable on the bond for the moneys so stolen, assuming them to have been moneys received by the treasurer for county purposes.

The law provides that all official bonds "shall be obligatory to the State upon the principal and sureties, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof." 1 G. & H. p. 164, § 10.

The bond in suit, we have seen, was conditioned not only for the faithful performance of his duties by *Halbert*, as treas-

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urer, but for the payment over according to law of all money that might come into his hands as such treasurer.

It is objected that the latter branch of the condition was unauthorized by law, and therefore of no effect. But if the condition for the faithful performance of his duties includes the paying over according to law, of all moneys that might come into his hands as such treasurer, nothing is added to the legal effect of the bond by the latter branch of the condition. An examination of the various statutes bearing on the question, shows clearly enough that one of the duties of a county treasurer is to pay over according to law all moneys that come into his hands as such treasurer; hence we shall consider the case as if the bond had been conditioned simply for the faithful performance of the duties of the officer.

The following sections are found in the act in relation to county treasurers. 1 G. & H. 640:

"SEC. 2. He" (the treasurer) "shall receive all moneys coming to the county, and disburse the same on the proper orders issued and attested by the auditor."

"SEC. 3. He shall give to any person paying money to him as treasurer, a receipt therefor, which receipt, except it be for taxes, shall be deposited by such person with the auditor, who shall give him a quietus for the same."

"SEC. 13. The treasurer shall annually make complete settlement with the Board of Commissioners, at the regular *June* term thereof, and shall at the expiration of his term deliver to his successor all public money, books, and papers in his possession."

In the act on the subject of the assessment of taxes, 1 G. & H. p. 68, are found the following provisions:

Sec. 123. Fifth clause. "After deducting the amount of taxes so returned delinquent, and the collection fees allowed the treasurer, from the several taxes charged on the dupli-

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cate, in a just and ratable proportion, the treasurer shall be held liable for the balance."

"SEC. 125. The revenue collected for county, road, and other purposes, shall be paid over, and settlement therefor made, as may be provided in the several acts and sections relating thereto, and to the duties of county auditors and treasurers."

"SEC. 127. If any such county treasurer shall refuse or neglect to pay over all moneys, as provided for herein, he and his sureties shall be liable for the full amount which he should have paid over, together with interest and ten per cent. damages."

By these various provisions, it is clearly seen that it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office; and a failure to make such payment constitutes a breach in his bond, conditioned for the faithful performance of his duties.

Does the fact that the money was stolen without fault on his part relieve him from the necessity of discharging the obligation imposed upon him by his bond? Leaving out of view the action of the Board of Commissioners in procuring a safe and ordering the treasurer to keep the money therein, the question is abundantly settled by authority. It is well established that a public officer who is required to give bond for the proper payment of moneys that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence; but that his liability is fixed by his bond, and that the fact that the money was stolen from him without his fault, does not release him from his obligation to make such payment. *Muzzy v. Shattuck*, 1 Denio 233; *Inhabitants of Hancock v. Hazzard and Another*, 12 Cush. 112; *The United States v. Prescott*, 3 How. 578; *Commonwealth v. Conely*, 3 Penn. S. R.

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872; *The State of Ohio v. Harper et al.*, 6 Ohio S. R. 607. In the latter case the Court say: "By accepting the office the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do these acts. It is, in effect, an insurance against the delinquencies of himself, and against the fault and wrongs of others, in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer, when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny be shown to have been without his fault, still by the terms of the law, and of his contract, he is bound to make good any deficiency which may occur in the funds which came under his charge." The language of the Court in the case cited from Cushing is as follows: "A collector of taxes, by accepting the office, takes the risk of the safe-keeping of the money he has actually received. His obligation is not regulated by the law of bailments, and the cases cited to that effect are inapplicable. He is a debtor, an accountant, bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance; this is founded on the nature of his contract, and considerations of public policy."

We are aware that, in the case of *The Supervisors of the County of Albany v. Dorr et al.*, 25 Wend. 440, a different doctrine was held, but that case was earlier than any of those above cited, and it is overruled substantially, if not expressly, by them.

Does the fact that the Board of Commissioners procured a safe, and ordered the treasurer to keep the funds therein, release the treasurer from his obligation to pay over the money,

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it having been stolen? This depends upon the power of the Board of Commissioners to make the order in question; for if the Board had no power to make the order, it was a nullity, and the treasurer was not bound to obey it, nor does it furnish him any legal ground of discharge from his obligation.

We take it to be clear that a county treasurer is an officer who acts upon his own responsibility, and independently of the Board of Commissioners of the county, so far as the keeping of the funds of the State and county is concerned. He is the proper custodian of the funds, and we are aware of no law which authorizes the Board of Commissioners to direct how, where, or in what manner, the funds shall be kept.

The following provisions of the act for the organization of County Boards, (1 G. & H. p. 247) are cited by counsel for the appellants to show that the Board had power to make the order in question:

“SEC. 13. Such Commissioners in their respective counties, shall have power at their meetings: 1. To make orders respecting the property of the county in conformity to law, to sell the public grounds of the county upon which the public buildings are situated, and to purchase in lieu thereof, in the name of the county, other grounds in the county seat, on which such buildings shall be erected; to purchase other lands for the enlargement of the public square, and to take care of and preserve such property.”

“SEC. 16. Such Commissioners shall cause a court-house, jail, and public offices for the clerk, recorder, treasurer, and auditor, to be erected and furnished, where the same has not been done, and shall keep all the public buildings of the county in repair, and such offices, if practicable, shall be made fire proof, and shall be occupied by such officers respectively.”

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Also section 7 of the act in relation to county treasurers. 1 G. & H. p. 641: "He shall at all times keep his books and office subject to the inspection and examination of the Board of County Commissioners, and shall exhibit the money in his office to such Board at least once a year."

We do not think any of the above provisions give the Board power to direct the treasurer how, or where, he shall keep the funds.

If they can make an imperative order on him to keep them in a safe, they can make such an order that he deposit them in a favorite bank, or place them elsewhere, as their fancy or caprice may dictate; indeed, if they can legally require him to keep the money in a safe, and thereby take from him the necessity of exercising his own discretion and prudence in the matter, and relieve him also from responsibility, they might require him to deliver it to themselves, and become themselves the custodians thereof.

As the Board could not make a binding order on the treasurer to keep the funds in the safe, it was optional with him to keep them there or elsewhere; and by placing them there, he took upon himself the risk of their safety, as effectually as if no such order had ever been made. The Board could not, by an order which they had no authority to make, requiring the treasurer to keep the funds in a particular place, bind the county and release the treasurer from liability. That an unauthorized act of the Board of Commissioners is void, is a proposition that needs the citation of no authorities in its support. The case of *Conner v. The State*, 4 Blackf. 241, however, is so analagous to the present, that it will be proper here to notice it. There a collector and his sureties were sued on his bond, for failing to collect and pay over the county revenue for the year 1832. The sureties pleaded that the Board of Commissioners of the county, at their session of *January*, 1833, and on the first Monday of that month,

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the time at which the tax mentioned became due and payable to the county, without the consent of the sureties, made and entered an order, by which they gave further time to the collector until the first *Monday* of *March* next thereafter, to pay the revenue for 1852; that at the time when the order was made, the collector was solvent and able to pay, but that he had since become insolvent, &c. But the Court say: "The powers of the Board of Commissioners are also fixed and designated by law. Among them is not the right to interfere with, or in any way affect, the course marked out for the collector or treasurer. That Board can neither abridge nor enlarge the duties or liabilities of those officers. The order giving further time in which to pay the revenue was therefore wholly inoperative."

For these reasons the majority of the Court are of opinion that the judgment below should be affirmed.

HANNA, J.—From the conclusion of the Court, upon the record presented, I must respectfully dissent. So far as it is necessary to notice any difference of opinion between my brother judges and myself, it appears to rest, in the case at bar, solely upon our respective views in regard to the relative rights and positions of the Board of County Commissioners, and the county treasurer, towards the county funds, revenues and moneys.

By this decision, it would seem that the county treasurer is to be regarded as independent of the control, and even direction, of the county board; whilst I think their relative statutory rights and duties are such that he can shield himself behind their orders and action in this case.

It has been decided by this Court that, in view of the duties and organization of the Board of Commissioners of a county, such board has control to a great degree, of the finances of the county. *The Board, &c. v. Saunders*, 17 Ind. 437. And

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are the guardians of the county treasury. *The Board, &c. v. Chitwood*, 8 Ind. 507.

It is also true that under our statutes the treasurer in each county is, not only to collect such taxes as said board may levy, but he likewise acts as the keeper of said funds, and as a kind of disbursing agent in paying out the same in pursuance of warrants, or orders, drawn upon him. His duties are tolerably clearly defined by statutes. So far as we are informed, the funds stolen were county funds and came into this treasurer's hands in the regular course of business, and were such as it would have been his duty to disburse upon proper orders made by said board. By law it was the duty of the board to provide and furnish an office for said treasurer. This they did. But they did not stop there, but made an order that he should keep the funds, &c., in said office in the safe so provided. The treasurer obeyed that order, and a loss ensued. The question is whether this order, and the act of the treasurer in obeying it, is a defence to him against the consequences which resulted. The appellants say it is. The appellee that it is not, on the ground that he was not bound to obey the order, because the board transcended their powers in making it. It may be possible that the positions and duties of the board and of the treasurer are relatively such towards the finances of the county, that this proposition of the appellees does not express their respective legal rights. It may be, the treasurer was not bound to obey the order made by the board, and yet, having obeyed it, he can defend under it. For instance, it has been held, that an improper and illegal allowance made by a board to a treasurer, would enable him to defend against a suit for the recovery of such amount. *Snelson v. The State, &c.*, 16 Ind. 29. Upon what principle can this decision be sustained? On the ground, we suppose, that the board has the general power to make allowances payable out of the treasury. That would be beyond

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doubt as to cases in which the claim is legal. But where it is illegal how can it be sustained, if the right of the board to control the funds of the county is denied? We suppose such action can then be sustained only on the ground that the board has jurisdiction of the question of allowances and acted within the general scope of the authority conferred. Perhaps there might be instances in which that action would be so palpably outside of authority as to be void. This we need not determine in this case.

By the 16th section of an act organizing county boards, it is, among other things, made their duty to cause the erection of public offices and furnishing thereof, and that the same shall be fire proof if practicable, and such offices shall be occupied by the said officers—the treasurer is mentioned. 1 G. & H. 250. By the acts of 1853, p. 136, 1 G. & H. p. 641, the duty of the treasurer to keep his office in fire proof buildings, where the same have been provided, is reasserted, and it is declared to be a finable offence if he fails to do so, &c.

In this case there was not a literal compliance, by the board, with the requirements of the statute in erecting a fire proof office; but it is shown by the agreement that they supposed they were furnishing a fire proof and burglar proof safe in which to keep the funds of the county. Of course, whether it was of that character was a question of fact—not of law. The law would have fixed the duty of the treasurer as to the place of keeping his office, if fire proof buildings had been erected. As this had not been done, the board, we suppose, in view of that fact, and of the kind of safe purchased, made the order set forth to regulate the acts of the treasurer.

The board is a body corporate and politic and have such duties, rights and powers as are incident to corporations, and not inconsistent with the act organizing said board. 1 G. & H. 248. The powers of the board as a corporation are such

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as are incident to corporations—under this provision—not such as are specially conferred by name on said corporations by statutes. It is true, that it has been often held that the said board is an inferior Court of special and limited statutory jurisdiction; that is, its judicial powers are such as the statute specially points out, but the same language does not appear to be used in reference to its corporate powers. Indeed it has been held that in legal contemplation said board is the county. *The State v. Clark*, 4 Ind. 316. This was said in reference to the property of the county and such as was entrusted to the management of the county. The board then is a corporation with certain limited judicial powers, and with the ample corporate powers alluded to. The auditor is the clerk of the board or corporation, keeps its records, and, among other duties, draws orders on the treasurer as directed by the board; the treasurer collects, receives, keeps and disburses the funds belonging to, or entrusted to the care of, said corporation. His office, books and money are subject to the inspection of said board, and he may be removed by said board from office. 1 G. & H. p. 641-2.

In view of the general corporate powers of the board over the funds of the county, and looking to the clearly defined interest of said board to control the treasurer as to the manner and place of keeping said funds, as evidenced by the order fully entered after the loss, and the provision which was made whereby the safety of the funds was supposed to have been provided for, I am of opinion that a compliance by the treasurer with the directions of the board, in that behalf, furnished him with a defence to an action because of the loss which was the result of such order. I do not go beyond the case, as presented at bar, in the application of the power of the board to interfere with or direct the treasurer as to the mode of keeping the public moneys of the county. I do not question nor look to the legal rights or liability of the treas-

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urer where the funds have been stolen, in the absence of any order or action of the Board of Commissioners in regard to said funds, or of an order less pointed and effective than the one in question.

It was suggested in argument that a conclusion different from that arrived at by the Court in this case would jeopardize the public interest. I can not see the matter in that light, for the simple reason that this case stands upon its own state of facts, which may never occur again in another case.

Per Curiam.—The judgment below is affirmed, with costs and one-quarter of one per cent. damages.

W. E. Niblack, N. F. Malotte and Thomas R. Cobb, for the appellants.

John Baker, for the appellee.

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ATTACHMENT—PRACTICE.—Where an issue is formed on an affidavit for attachment, it should be tried by the Court, or jury, with the issues in the cause in which the attachment is issued.

SAME—WAIVER.—But if the issue in the cause is first tried, and there is no objection interposed by the defendant, to the subsequent trial of the issue on the affidavit for attachment, he will be deemed to have waived the right which he had to insist upon a trial of the whole controversy at once.

FRAUDULENT INTENT—MORTGAGE.—Whether a mortgage is given with a fraudulent intent is, under the statute, § 21, 1 G. & H. p. 353, a question of fact for the jury to determine.

APPEAL from the *Fayette* Circuit Court.

HANNA, J.—The appellees sued the appellant on a note.

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At the same time they caused a writ of attachment to issue against the property of the then defendant, which was returned served, &c. The defendant appeared and by separate paragraphs of his answer put in issue the allegations in the complaint and those in the affidavit for the order of attachment. It appears from the record that the Court tried the "cause of action on the note," and rendered a judgment for the plaintiff; and as to the "attachment suit and proceedings herein," a jury trial was had, but no verdict rendered. The case was continued from term to term, the record states, until upon a jury trial there was a verdict and judgment for the plaintiff.

The latter branch of the case is attempted to be brought here, and errors are assigned affecting the correctness of the verdict in view of the evidence, and of the instructions given to the jury. In *Foster v. Dryfus*, 16 Ind. 158, it was stated that, "where an issue is formed on the affidavit, it should be tried by the Court or jury, with the issues in the cause in which the attachment issued." To the same effect is the case of *Bradley v. The Bank, &c.*, 20 Ind. 531, and in which it was further held that, "the issues on the attachment were properly made up for trial, at the time of the trial of the merits of the cause of action, and hence we must hold that they were then tried." Preliminary to an examination of the points presented we must determine whether the appellant is, under these decisions, in a position to avail himself of any errors that may have been committed in the progress of this second trial, even if such had occurred.

We are of opinion that he is. The record clearly shows that the trial before the Court was "on the note." Whether, if the defendant had interposed any objection, a further trial "as to the attachment" could have been had, we need not determine, as no such objection was made. Indeed, so far as the record shows, the separate trials thus had appear to have

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been with the consent of said defendant. By his acts, in that behalf, he waived the right which we suppose he had to insist upon the trial of the whole controversy at once. It may be possible, but upon this point we decide nothing, that the failure of plaintiff to place upon trial all the issues, as well upon the attachment proceedings as upon the main action, in the first instance, would have resulted in a defeat of any attempt by him to place a part of those issues upon trial in a second or further trial, if the defendant had insisted upon his rights, and had not by his acts consented to that mode of disposing of said issues.

The following charges were given by the Court, at the request of the plaintiffs:

1. The only point or issue in this case is whether or not *Maple*, before the issuing of the attachment, had sold, conveyed or otherwise disposed of any of his property, or suffered it to be done, with the intent to cheat, hinder or delay any of his creditors; if he had, you must find for the plaintiffs.

2. It makes no difference in this case what the intention or object of *Fletcher* and *Cullum* was in taking the mortgage—even if it was honest—and *Maple* had the fraudulent intent above named, you must find for the plaintiffs.

The real question was between the attachment creditors and these mortgagees, if it had been so shaped in the pleadings as to present that question for trial. But the pleadings upon the part of the defendant were, as to the main action, a denial, payment and set-off; and as to the auxiliary proceedings, a denial of the causes alleged in the affidavit for an attachment, which were that said *Maple* had “sold, conveyed and disposed of his property subject to execution with the fraudulent intent to cheat, hinder and delay his creditors.” Under this the evidence was introduced in reference to the mortgage to *Fletcher* and *Cullum*. They do not come in, nor

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set up any claim to the property under the mortgage, in any form in this suit. It appears to us the question was, whether the attachment properly issued under that affidavit. We think it did. If property, other than that which was thus mortgaged, had been seized by the attachment, of course such mortgagees would have had no interest therein, and we suppose that upon the trial the plaintiff might have shown that the defendant had made the said mortgage with the intent to hinder, &c., so as to thus establish the allegation in the affidavit and enable the plaintiffs to hold the property seized to satisfy their judgment. But in the case at bar, it so happened that the property mortgaged was that seized by virtue of the attachment. As between the attachment creditors and debtor, we suppose, the principle is the same in this as the former instance, and the plaintiff would recover. Whether the position of the mortgagees was such as to have enabled them to successfully interpose a claim to the property is quite another question. They did not so interpose nor were they made parties, and therefore could not be concluded by the determination in the case at bar, unless it should be by some mere question of laches, which would not at all affect the point now being considered.

The third charge was as follows :

"3. If after the mortgage was given, the defendant remained in possession of the property mortgaged, after the time named in it, using and trading with the property as the owner, it is a fraud and you must find for the plaintiffs."

It appears to us this instruction was calculated to confuse and mislead the jury to the prejudice of the defendant. They were told that, if he remained in possession after the mortgage was given and after the time named in it, &c. If it was intended to say that the defendant could not hold possession after the date of the mortgage, it is certainly erroneous. If some other point of time was intended to be indi-

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cated at which the possession of the defendant should cease to be rightful, it should have been more specific, especially in view of the fact that the date when the debts secured by the mortgage were to become due is not stated particularly; and the right to retain said possession was to remain in the mortgagor until the maturity and failure to pay said debts. The question of the rights of the mortgagor in said property, whilst thus in his possession, is discussed at length. We shall not follow learned counsel in that discussion, having come to the conclusion, in view of the evidence, that the instruction was calculated to mislead the jury, not only in confusing them as to the time at which the right of possession, &c., ceased in the defendant, but also as to whether they were, by the statement of the Court, concluded in considering whether the facts stated by the Court, if found by them, established fraud in the defendant. The statute is that fraud is a question of fact for the jury. The most natural construction of this charge would be that if the jury should find that the facts existed alluded to therein, then, whether they constituted fraud or not, was not for the jury to determine, but was for the Court, and established fraud.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

B. F. Claypool and *J. M. Wilson*, for the appellant.

Geo. Holland and *James C. McIntosh*, for the appellees.

NILES v. STILLWAGON.

STATUTES CONSTRUED—JUDGMENT OF FORECLOSURE REPLEVIABLE.—

Where, in a judgment of foreclosure, the amount due is found by

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the Court, and the mortgaged property ordered to be sold to satisfy the same, such judgment is repleviable under section 420, 2 G. & H. p. 233, although judgment is not given for the recovery of the money.

SAME—EFFECT OF RECOGNIZANCE OF BAIL—ACTION.—By section 427, *id.*, the recognizance of bail given in such case, operates as a judgment confessed, in favor of the judgment plaintiff, and against the replevin bail, for the sum of money found due by the Court; and the undertaking or recognizance of bail will support an action against such bail, for any balance due, after the property ordered to be sold is exhausted.

APPEAL from the *Putnam* Common Pleas.

DAVISON, J.—The appellant, who was the plaintiff, sued the appellee upon an instrument in writing in the form of a recognizance of replevin bail.

The facts are these: At the *April* term, 1859, a suit was pending in the *Putnam* Circuit Court, wherein the said *John C. Niles* was plaintiff, and *Mariah Boswell*, the widow, and *Albert Boswell*, and others, the heirs of *John B. Boswell*, deceased, were defendants, upon a complaint to foreclose a mortgage executed by said *John B.* in his lifetime, and also by his then wife, the said *Mariah*. And the Court then and there found that there was due and owing to the plaintiff upon the mortgage 1,193 dollars, and adjudged that the equity of redemption of the mortgaged premises be foreclosed, and that the sheriff proceed to sell the same, as under execution, to pay the 1,193 dollars so found to be due to the plaintiff as aforesaid, and also his costs, &c., returning the overplus, if any, to the defendants. After this, on the 19th of *April*, 1859, the defendant, *Stillwagon*, executed on the order book of the Court, just below the entry of said judgment, his written undertaking as follows:

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defendants, for the payment of the foregoing judgment, together with interest and costs accrued and to accrue at or before the expiration of the term of stay of execution.

“DAVID S. STILLWAGON.”

And the said *Stillwagon*, having been called by the plaintiff, testified, “that he is the brother of said *Mariah Boswell*; that he signed the written undertaking at her instance and request, she being one of the defendants to the order of foreclosure; that there was no consideration for the replevin bail so entered as aforesaid, and that he never had any conversation or agreement with the plaintiff on the subject of the replevin bail, or in relation to the stay of the order of sale.” Afterwards, on the 19th of *October*, 1859, an order of sale was issued on said decree and delivered to the sheriff, who, having duly advertised the mortgaged premises therein described, sold the same at public auction to one *Abel Knight* for 800 dollars, which, after deducting cost, &c., was paid over to the plaintiff, leaving a residue of said judgment unpaid amounting to 800 dollars. For the recovery of this residue, the present suit has been instituted against the defendant upon his above written undertaking.

The Court tried the issues and found for the defendant; and, having refused a new trial, rendered judgment.

In argument two questions are presented for our consideration: 1. Was the judgment of foreclosure repleviable? 2. If it was, can this suit be maintained on the defendant's undertaking?

The statute says: “When judgment has been rendered against any person for the recovery of money or sale of property, he may, by procuring one or more sufficient freehold sureties to enter into a recognizance acknowledging themselves bail for the defendant, for the payment of the judgment, together with the interest and cost accrued and to

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accrue, have a stay of execution," &c. 2 R. S., G. & H. p. 233, § 420. Here, there was no judgment "for the recovery of money;" but the Court found the precise amount due on the mortgage, and then gave judgment of foreclosure and that the mortgaged premises be sold for the sum so found due. This, it seems to us, is repleviable under the statute. It can make no essential difference that, in this instance, "the remedy of the mortgagee was confined to the property mortgaged;" *id.* p. 294, § 632; because it is the judgment that the property be sold for the payment of a specified sum of money that is repleviable, and the replevy being valid, it had the effect of a judgment confessed in favor of the plaintiff and against the defendant for the sum found by the Court; *id.* p. 233, § 427; and being such judgment, we perceive no reason why an action can not be maintained upon it. True, it is made the duty of the clerk, at the expiration of the stay, to issue execution jointly against the judgment debtor and replevin bail; *id.* p. 236, § 28; but that is a mere direction and may be omitted, as in this case, where there is no judgment against the mortgage debtors, and the remedy as to them is confined to the mortgaged property. And though there is no personal judgment against the mortgagors which can be allowed to "stand open for the use of the replevin bail;" *id.* 309, § 676; still he should, in our opinion, be allowed to recover the amount which he pays from the mortgage debtors. But, be this as it may, the undertaking, in this instance, is not only a judgment confessed to the plaintiff, upon which he has his right of action, but is, in effect, a contract with him to pay whatever of the amount, found due, remains unpaid after the mortgaged property is exhausted. And whether this suit be upon the entry of replevin bail as a judgment or a mere contract, and under the pleadings it may be deemed as founded on either, the plaintiff is entitled to recover. 8 Blackf. 169; 5 Ind. 129; 7 *id.* 97.

Bennett et al. v. The State ex rel. Curry.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

H. Secrest and S. Turman, for the appellant.

Williamson & Daggy, for the appellee.



BENNETT *et al.* v. THE STATE *ex rel.* CURRY.

PRACTICE IN SUPREME COURT.—Errors assigned in this Court, and simply copied into the brief of the party making the assignment, without argument or authority in support of them, will not be considered by this Court.

APPEAL from the *Hancock* Circuit Court.

DAVISON, J.—This was an action against a constable and his sureties on his official bond. The bond is in the penalty of 1000 dollars, and conditioned in the usual form. It is averred that *Bennett*, who was the constable, in *April*, 1859, appointed and legally authorized one *Warner G. Smoot* to act as his deputy, and *Smoot*, being thus deputized, afterward, on the 27th of *November*, by virtue of an execution issued by one *Matthews*, a justice of the peace, in favor of *George Day* and *Bowen Matlock* against *Curry*, the relator, levied on certain articles of personal property, as the property of said relator, amounting, as per schedule filed with the complaint, to 217 dollars. It is further averred that the relator, on the 20th of *December*, 1859, and before the property was on execution, offered for sale, made out and delivered said schedule of his property to said deputy constable, and demanded that the same be set apart to him as exempt from execution; he then and there being a resident householder of the township, &c., which demand was, by the said deputy, refused, &c.

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Defendants demurred to the complaint, but the demurrer was overruled.

Issues having been made, the cause was submitted to a jury, who found for the plaintiff. New trial refused and judgment.

Various errors are assigned, but the appellant, in his brief, presents no argument or authority in support of them. He simply recites the assignment of errors as it stands on the record; and this being the fact, the cause before us must be deemed as without a brief. *Parker v. Hastings*, 12 Ind. 654. See also Rule 28 of this Court, Ind. Dig. p. 722. The errors assigned will not, therefore, be noticed. We have, however, looked into the record and perceive nothing amiss in the rulings of the Court or the conclusion of the jury.

Per Curiam.—The judgment is affirmed, with five per cent. damages, and costs.

T. D. & R. L. Walpole, and *Riley & Hough* for the appellant.

SHORT v. BARKER.

ACTION.—The owner of personal property which has been stolen, can, in this State, maintain a civil action for its value, before the criminal prosecution for larceny has been determined.

APPEAL from the *Jackson Circuit Court*.

Per Curiam.—Suit to recover the value of certain personal property alleged to have been wrongfully taken. Answer, among other things, that an indictment was then pending, and undetermined, against the said defendant, for the alleged

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larceny of said property, &c. There was a demurrer overruled to the third paragraph of the answer.

Whatever the English rule may be upon the right of the owner of personal property stolen, to maintain a civil action before the determination of a criminal prosecution, it appears to be settled in this State, perhaps in this country, that such civil action can be maintained. *Lofton v. Vogles*, and cases cited 17 Ind. 106.

The judgment is reversed, with costs.

Martin Ferris, for the appellant.

Jason B. Brown, for the appellee.

CUNNINGHAM and Others v. McKINDLEY.

LIMITATIONS—TRUSTS.—Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust, and time begins to run against a trust only from the date of its open disavowal.

SAME.—Even unjustifiable delay and gross inattention on the part of some of the *cestui que trust* furnish no bar to relief against persons conversant with the trust.

LIMITATIONS—STATUTES CONSTRUED.—Section 220, 2 G. & H. p. 163, relates to causes of action originally arising upon promises or contracts, and not to continuing trusts, and especially those arising by operation of law.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—On the 28th of April, 1836, *John Cunningham* purchased a tract of land with the money, it is alleged, of *James McKindley*, and took the deed to himself. At that time, *James* was the step-son of said *Cunningham*, and was

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twenty years of age. In 1859, *Cunningham* died, not having conveyed the land in question to *McKindley*. In 1860, *McKindley* instituted this suit against the heirs of *Cunningham* to obtain a conveyance of the land from them to him.

The defendants answered:

1. The general denial of the complaint.
2. The six years statute of limitations.
3. The twenty years statute of limitations.
4. The fifteen years statute of limitations.
5. Lapse of time, knowledge, &c., and consequent waiver or estoppel as to claim.

A demurrer was sustained to the 2d, 3d, and 4th paragraphs. To the 5th there was a reply in two paragraphs—

1. A denial.
2. And for a further reply to said paragraph, the plaintiff admits that said deceased, *John Cunningham*, did not make him a deed for the land in controversy, on his request, about the time he arrived at the age of twenty-one; but he charges that said *John* did not at that time, or at any other time, repudiate or deny that he held said lands in trust, as in said complaint alleged. Said plaintiff further says that the reason he did not bring suit against said *John* in his lifetime, to declare said trust, was that said *John* at all times promised and agreed to vest the title to said land in plaintiff, when he divided his land amongst his children,—that he implicitly relied on said promises until the last will and testament of said *John* was made and published, in which no provision is made for vesting the title to said land in plaintiff.

Issues of fact. Trial and judgment for plaintiff.

It is claimed by the defendant that the Court erred in sustaining a demurrer to the 4th paragraph of the answer; while, on the other hand, the plaintiff contends that no statute of limitations was applicable to the cause of action in this suit.

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This suit was to enforce a trust; was upon an equitable cause of action, to which, prior to the code of 1852, no statute of limitations applied. And, it is claimed, on the authority of *The State v. Clark*, 9 Ind. 241, re-affirming the case of *The State v. Clark*, 7 Ind. 468, that, for that reason, a suit is not barred by that code, in the case at bar, till the whole time specified in it, as the limitation, viz: 15 years, has elapsed, reckoning from the coming into force of the code.

We shall not find it necessary to decide this question here. Though there was, prior to the code, no statute of limitations, yet equity following the law in this particular gave lapse of time the force of a statute. See 2 G. & H. 156, notes. The paragraph of the answer in this case, then, setting up lapse of time, was substantially, an answer of the statute of limitation; and the reply to it would have been a good reply to an answer of the statute; and the merits of the question were involved in, and tried upon the issue formed upon the 2d paragraph of the reply to the answer of lapse of time; for lapse of time and the statute of limitation would both have begun to run, as ultimately constituting bars to the action in this case, from the same act or circumstance, and the same moment of time. That act and time were the disavowal of the trust by the trustee; and they happened, according to the finding of the jury, within less than fifteen years prior to the institution of this suit.

In *Oliver et al. v. Piatt*, 3 How. (U. S.) Rep. p. 333, Judge Story says: "Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1881, no final overt act was done by *Baum* in violation of his duty as trustee; and the first and great

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breach of that duty, on his part, was the surrender of the certificates of the trusts to *Oliver*, at different periods between 1828 and 1831. At what particular period the subsequent acts of *Baum*, *Oliver*, and *Williams* became first known to the plaintiff and the other proprietors of the *Piatt and Port Lawrence Companies* having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust, it can furnish no ground for any denial of the relief which the case otherwise requires."

The code enacts, (2 G. & H. § 220, p. 163,) that "no acknowledgment or promise shall be evidence of a new or continuing contract whereby to take the case out of the operation of the provisions of this article, unless the same be contained in some writing, signed by the party to be charged thereby."

This section, it will be perceived, relates only to causes of action originally arising upon promises or contracts, and does not, as we think, relate to continuing trusts, especially those arising by operation of law. A new promise in writing takes a former promise or contract, by parol, out of the statutes of limitations; but a parol acknowledgment of the continuance of a trust may prevent the running of the statute against it. Till the refusal to execute a trust, a cause of action on it has not accrued. It is like those cases where a cause of action does not arise, nor the statute begin to run until after demand, or discovery of fraud, &c. See 2 G. & H. p. 157, notes. We are satisfied, in this case, with the instructions to the jury, the finding of the jury, the judgment of the

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Court, and that justice has been thereby meted out to the parties.

Per Curiam.—The judgment is affirmed, with costs.

Huff & Jones, and *George Gardner*, for the appellants.

Daniel Mace, for the appellee.

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146	594
22	153
159	557

EXEMPTION OF PROPERTY—STATUTES CONSTRUED.—Section 3, 2 G.

& H. p. 370, does not operate as an absolute exemption of 300 dollars' worth of property in favor of the debtor, without any acts on his part, but only relates to such real estate as had been duly exempted under the other provisions of the exemption law, before the execution of the sale or mortgage of the same by the husband without the consent of his wife.

APPEAL from the *Wayne* Common Pleas.

HANNA, J.—Suit on notes and to foreclose a mortgage. Answer setting up, among other matters, that at the time of the execution of said mortgage, said mortgagor was, and yet is, a resident householder of said State, the head of a family, with a wife living, and that she did not join in said mortgage; that he had no other real estate but that upon which he then resided, and yet occupies, being the same so mortgaged; that all the property, real and personal, which he then owned and now owns, including that mortgaged, was not, nor is it now, of the value of 300 dollars, &c. A list or schedule of the property, with the alleged value annexed, was filed with said answer, and defendant asked that the same might be exempt from execution, &c.

A demurrer was sustained to this paragraph of the answer.

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Trial. Judgment for plaintiff on the notes, and foreclosure decreed and order of sale.

The point presented for our consideration arises upon the ruling on the demurrer.

In the exemption act it is provided that:

"No mortgage or sale of any real estate exempted under the provisions of this act, shall be valid if executed by a married man, unless the deed be acknowledged by the wife in due form of law." 2 R. S. 337, or 2 G. & H. 370.

It is assumed in argument that, under this section, the mortgage is invalid, the mortgagor not having over 300 dollars' worth of property. On the other hand, it is insisted that said section has reference to such property only as has been set apart, exempt, at the request of an execution defendant, and in conformity to the provisions of said act, and does not affect property until after the same has been so selected and exempted.

It was held by this Court in *The State v. Melogue*, 9 Ind. 196, that the exemption is a personal right which the debtor may waive or claim, at his election. So in *Eltzroth v. Webster*, 15 Ind. 21, it is, in effect, held that a levy has to be made before the claim, under the statute, can be perfected, in that respect following the intimation in 9 Ind., *supra*.

The Constitution declares that: "The privileges of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale," &c., Art. 1., Sec. 22. Whether, under this provision, the legislature might enact a law absolutely exempting certain enumerated articles of property, or property of a certain value, to be selected by the defendant, and if not, then by some officer or person named in the act, is a question not before us, unless we should hold that the acts passed, in pursuance of said provision, do in fact thus absolutely exempt 300 dollars' worth of property of the

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debtor. As before stated, it was held in the case cited from 9 Ind., that the exemption, under this act, was a personal privilege which might be waived; this might be done, we suppose, by failing to select as required by the 9th section of the original act of 1852; or by failing to furnish the officer with the inventory, &c., as required by the supplemental act of 1859. 2 G. & H. 367. The first section of the act of 1852 appears to reserve, from sale or execution, 300 dollars in value of the property of the debtor, but the very next section provides that it may be either real or personal, as the debtor may elect; the next section is the one relied upon in this case; the 5th, 6th, 7th, and 8th sections then provide for the manner of choosing appraisers, and for the appraisement of the property to be exempted. The 9th section is that: "If any execution debtor shall claim property as exempt by virtue of this act, he shall elect whether he will claim personal or real property, or both, and shall designate the property so claimed." This very clearly indicates that the legislation thus being had, for the benefit of the debtor, was such as he might avail himself of or not, at his pleasure. So this Court heretofore held.

But, if any doubt had existed in reference to that point, it appears to us the legislature, by supplemental enactment, so far as they could, dispelled the same; for it is expressly declared that, "until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution defendant as exempt from execution." This is said in reference to a sworn schedule of the property of the debtor to be furnished by him.

But in no part of the act of 1852, or of supplemental or amendatory acts thereof, is there any provision pointing out the particular kind of property, or the manner in which it shall be selected and set apart to a mere passive debtor, who may refuse or fail to elect as to the property he will retain. Thus far, then, the legislative enactments under this provis-

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ion of the Constitution do not come up to the ideas of the appellants in this case, as advanced in argument, as to the intention of the framers of this humane section of the fundamental law. We do not say but that this part of the argument may be correct, but that the law-makers have not acted in accordance with that view.

Then as the statute does not, of itself, exempt the property of the debtor without the performance of certain designated acts upon his part, or in his behalf; and as it has been held that these acts can not take place until the writ of execution is in the hands of the proper officer, perhaps levied; it would seem to follow that the facts set up in the paragraph of the answer are not sufficient. In other words, that the section of the statute relied on has reference to property that has been exempted by law, after the proper election of the party.

But, it is said, that if the facts here pleaded can not be set up in answer to the action, the debtor may lose the benefit of them, because it has been already held that a mortgagor can not, after the mortgaged property has been ordered to be sold on foreclosure, claim the property as exempt from such sale. *Slaughter et al. v. Detiny*, 15 Ind. 49. The decision in the case referred to, is based upon the ground that the judgment, by which the sale of the specific property is ordered, concludes the question of exemption as to such property.

It is true, then, that under this decision, his claim for exemption, as to the property mortgaged, can not be preferred by the debtor after the foreclosure and order of sale shall have been rendered; and if it is equally true that, under the statute and other decisions quoted, his answer is not sufficient, it would seem to follow that he may be stripped of the property so mortgaged, although he may have no other left. But why is this; because the statute is defective, or the debtor, by his voluntary act, in mortgaging his property, deprived himself of the benefits thereof, waived it? ¹It mat-

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ters not upon which ground the objection to the answer is placed. It is surely defective.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages, and costs.

M. Wilson, George A. Johnson, and Lafe Develin, for the appellant.

J. B. Julian for the appellee.

COOKE v. ROSS et al.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—PRACTICE—JURISDICTION.—1. Creditors, who regularly institute these proceedings, acquire a lien upon the claim intended to be reached, from the time of the service of process on the defendant, and the subsequent assignment of the claim does not divest that lien; nor is it divested by a subsequent amendment of the original affidavit.

2. It is doubtful whether section 522, 2 G. & H. 261, contemplates the formation of issues as in ordinary cases.

3. *Seemle*, that where these proceedings are instituted against *A*, a judgment debtor, and *B*, (who is indebted to *A*,) for the purpose of reaching such indebtedness, the question as to the liability of *B* can not properly be raised by *A* in his pleadings.

4. But, at least, it is competent for the plaintiff to waive the answer of the debtor, and, having done so, it is competent for the Court to refuse the debtor leave to file an answer and make new parties, &c.

5. These proceedings may be instituted in a Court different from that in which the original judgment was rendered and out of which the execution was issued.

APPEAL from the *Knox* Common Pleas.

DAVISON, J.—This was a suit instituted by *Ross* against *Cooke* and *Burtch*, under the statute regulating “proceedings

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supplementary to executions." 2 R. S. p. 260. The complaint, which is in the form of an affidavit, alleges, in substance, these facts: Ross, on the 16th of *August*, 1852, recovered a judgment in the *Knox* Circuit Court against *Cooke* for 2,420 dollars, which is in full force and unpaid, and upon which an execution was issued and returned "no property," &c. On the 15th of *September*, 1855, another execution issued on said judgment, was delivered to the sheriff of *Knox* county, and is now in his hands. *Cooke*, the execution defendant, has no property subject to execution, but *Burtch* is indebted to *Cooke* for money in his hands, on deposit, belonging to *Cooke*, to the amount of at least 1,000 dollars, which ought to be applied to the payment of said judgment, &c. This affidavit was sworn to and filed *September* the 15th, 1855, and on the same day a summons was duly issued and served on the defendants, *Cooke* and *Burtch*. After this, on 19th of *December*, 1855, the affidavit appears to have been re-sworn to.

There is a bill of exceptions which shows that *Cooke* filed an answer to the complaint, alleging, "that the original complaint in this case was filed on the 15th of *September*, 1855, and that afterwards, on the 19th of *December* then next following, he demurred to said complaint, which demurrer was sustained, and thereupon the plaintiff amended and filed the complaint as amended; that before the filing of the amended complaint, to-wit: on the 24th of *September*, 1855, *Cooke* assigned and transferred the "money in the hands of *Burtch*, on deposit," as specified in the complaint, to *Judah* and *Denny*, and that said assignment was made in good faith, &c. A demurrer to this answer was sustained, and *Cooke* excepted. The plaintiff then waived all answer of *Cooke*, and thereupon he, *Cooke*, moved for leave to file an answer and make new parties, &c.; but the Court refused leave, &c. The case was then submitted to the Court for trial, and, the evidence hav-

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ing been heard, there was a finding for the plaintiff. New trial refused and judgment.

The demurrer was well taken. From the time of the service of process on the defendants the plaintiff had a lien upon the claim in the hands of *Burtch*; *Graydon v. Barlow*, 15 Ind. 197; and, after that time, *Cooke* had no right to make the assignment. But whether the assignment was, or not, valid, was a question involving the liability of *Burtch*, and one which could not, properly, be raised by *Cooke* in his pleadings. It may be doubted whether section 522, 2 R. S., G. & H., p. 261, upon which this proceeding is based, contemplates the formation of issues as in ordinary cases. *Carpenter v. Vanscoten*, 20 Ind. 50. But, be this as it may, the plaintiff had a right "to waive the answer of the debtor," and having done so, in this instance, the ruling of the Court upon the "motion for leave," &c., must be sustained. *Id.* p. 262, § 523.

A point is made in reference to the jurisdiction. It is said that, execution having been issued against *Cooke* upon a judgment of the Circuit Court, the Common Pleas could not take cognizance of this proceeding. We think otherwise. The affidavit may be filed and the suit commenced before "the clerk of any Court of record of any county." *Id.* p. 261, § 519. We perceive no error in the record.

Per Curiam.—The judgment is affirmed, with costs against *Cooke*, the appellant, &c.

J. C. Denny, for the appellant.

Morton v. Noble.

MORTON v. NOBLE.

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158 567

MORTGAGE—WIDOW'S ESTATE IN LANDS OF HUSBAND.—Prior to *May* 6, 1853, *A* executed a mortgage upon certain real estate to *B*, his wife not joining, to secure the payment of certain sums of money then due from *A* to *B*, and of all sums which might thereafter become due. *A* died in 1858, leaving a widow. One-third of the mortgaged land was afterwards set off to the widow. *B* then foreclosed his mortgage and had a decree for the sale of the other two-thirds to pay the indebtedness which existed at the date of the mortgage, and which accrued after *May* 6, 1853, and it was sold and the proceeds were only sufficient to pay that part of the debt which existed at the date of the mortgage. *B* claims a right to subject the widow's third to the payment of the subsequent indebtedness, on the ground that her dower estate in the land was abolished by the legislature, and her contingent fee therein never attached by reason of the mortgage.

Held, that, under the circumstances, *B* had no claim under the mortgage upon the third set off to the widow.

APPEAL from the *Wayne* Common Pleas.

PERKINS, J.—On the 25th of *February*, 1853, *Thomas G. Noble* was the owner of a certain tract of land in *Wayne* county, *Indiana*. He was the husband of *Rhoda Noble*, a second wife, by whom he had children living, and who, with their mother, still survive. On the day above named said *Thomas G. Noble* executed, his wife not joining therein, a mortgage on the tract of land above mentioned to *Wm. S. T. Morton*, to secure him "in the payment of all sums now due, or which may hereafter be due him from said *Noble*, and from all liabilities for him now or hereafter," &c.

We say the instrument was a mortgage because both parties so treated it. *Noble* became indebted to *Morton* in a given sum, prior to *May* 6, 1853. He became indebted to him in a given sum afterwards. In *February*, 1858, *Thomas G. Noble*

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died, leaving his wife, *Rhoda*, and children by her, surviving, and leaving some debts, secured by the mortgage in question, unpaid.

In 1861, *Morton* proceeded to foreclose the mortgage; the Court ordered two-thirds of the land, one-third having been set off to the widow, to be sold on the mortgage. Those two-thirds sold for a sum sufficient to pay the debts *Thomas G. Noble* owed to *W. S. T. Morton* on the 6th day of *May*, 1853; but left those contracted after that date, unpaid. *Morton* now claims that the remaining third of the land, that set off to *Mrs. Rhoda Noble*, shall be sold to pay the debts contracted by her husband, *Thomas G. Noble*, after the 6th of *May*, 1853.

He makes this claim on the ground that *Noble* mortgaged the entire tract of land, subject to the dower right of his wife, prior to *May* 6th, 1853; that, on that day, her dower was abolished, and, hence, the entire right in the land vested, under the mortgage, in *Morton*. *Talbott v. Armstrong*, 14 Ind. 254, and cases cited, are relied on. The mortgage in question was executed to secure future advances unlimited as to amount and without specification as to time. While mortgages to secure future advances may be valid as between the parties, and also against subsequent creditors with notice, it is said by *Kent*, in his *Com.*, vol. 4, p. 176, that it is necessary to the validity of such mortgages against subsequent creditors, "that the agreement, as contained in the record of the lien, should give all the requisite information as to the extent and certainty of the contract, so that a prior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance." See 1 *Hilliard on Mort.* 285, *et seq.*

But the mortgagee is no longer, in our law, regarded as the owner of the land mortgaged. In the early period of the common law, the mortgagee was the owner, but subject to

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have his title divested by the strict performance of a condition by the mortgagor. Later, the mortgagor acquired the right in equity to redeem in a time undefined, after failure to perform the specified condition on the day. Later, the mortgagee acquired the right to foreclose the equity of redemption; and this is a right which, according to *Story*, the mortgagee can not waive by an executory contract. 2 *Story's Eq.*, § 1019.

Noble, then, after having mortgaged the land in question, remained the owner, subject to the mortgage; and, as his wife did not join in the mortgage, subject, also, to her dower-right in the premises. *Morton's* interest was an equitable interest to the amount of his unpaid advances to *Noble*. But *Morton's* equity was inferior to the equity of *Mrs. Noble*, and, on the 6th day of *May*, 1853, he had no interest in the land which it required any part of *Mrs. Noble's* third of the land to satisfy. At that date the legislature changed her inchoate interest in the land from a contingent life estate into a contingent fee. That enlarged right attached to the land so far as it was not curtailed by prior equities. This, it was competent for the legislature to ordain. We have seen that no equities then existed preventing the attaching of her enlarged right. See *Noel v. Ewing*, 9 Ind. 38. We think this is the plain equity of the case. *Morton* is not wronged. He took the mortgage without *Mrs. Noble's* signature. He knew that, on the 6th of *May*, 1853, the legislature abolished her dower, a life estate, but at the same instant created in her a contingent fee. He, at that time, was safe in the advancements he had made; and as to them, we may admit, for the purposes of this case, that he might have held the land, under the cases of *Strong v. Clem*, 12 Ind. 37, and *Frantz v. Harrow*, 13 *id.* 507. But they were satisfied without encroaching upon the share of the wife. In the case at bar, *Noble* still continued the owner of the land, and the right of his wife continued to

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exist therein, except as to *Morton's* equity in the interest of her husband.

However it might have been as between *Morton* and junior creditors of *Noble*, who might have obtained liens, we are clear that a mortgage by the husband, such as that executed in this case, should not operate, under the circumstances of this case, to bar the right of the wife to her third of the land. See *Davis v. Stonestreet*, 4 Ind. 101; *Reasoner v. Edmunson*, *id.* 393.

Per Curiam.—The judgment below is affirmed, with costs.

J. S. Newman, J. F. Kibbey and J. P. Siddall, for the appellant.

Pelle & Wilson, for the appellee.

GAGE V. CLARK.

JURISDICTION—WAIVER.—The provision that a defendant shall not be sued out of his township is for his personal advantage, and may be waived. Jurisdiction of the person, but not of the subject matter, may be conferred by consent.

PLEADING.—A complaint to enjoin the collection of a judgment rendered by a justice of the peace should show that the judgment was rendered without the defendant's consent, where the alleged error consists in the residence of the defendant in another township, and should contain a transcript of the proceedings before the justice, or at least a full statement of them.

APPEAL from the *Lagrange* Common Pleas.

PERKINS, J.—This was a suit in the Common Pleas to vacate a judgment rendered before a justice of the peace, and

22	168
170	110

22	168
170	580

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to obtain a temporary injunction restraining the collection of the judgment by execution.

The gravamen of the complaint was that the judgment was rendered against a resident of a different township of the county from that in which the judgment was rendered, there being, at the time, a justice in the township of the defendant.

The complaint did not give a transcript of the judgment and proceedings before the justice, nor state whether the judgment was rendered upon default or otherwise.

The Court granted a temporary injunction. At the next term the defendant answered, without oath, alleging that the judgment was rendered by confession; and then moved to dissolve the injunction, and it was dissolved.

The plaintiff appealed.

It is claimed that the Court erred in dissolving the injunction without written notice of the motion for dissolution having been duly given to the plaintiff.

The code provides, sec. 152, p. 59, that motions to dissolve or modify injunctions may be made in open Court, at any time after reasonable notice to the opposite party, which notice, by another section, is required to be in writing. 2 R. S. p. 222, § 792.

The answer in this case not being verified, and being unaccompanied by affidavits of extrinsic facts which might have furnished a ground for dissolution, constituted no basis for a motion to dissolve.

But the complaint itself was utterly insufficient to justify the original grant of the injunction.

The provision in the statute that a defendant shall not be sued out of his township is for his personal advantage, and may be waived. Jurisdiction of the person may be conferred by consent, not of the subject matter. A complaint, therefore, to enjoin such a judgment should show that the judg-

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ment was rendered without the defendant's consent. A transcript should have been filed with the complaint; or, at all events, a full statement of the proceedings resulting in the judgment. Again, the modes of vacating judgments in the higher Courts are pointed out by statute, and must be severally followed. *McQuig v. McQuig*, 13 Ind. 294. And as it is a general rule that the practice in the Superior Court governs before justices in the absence of special statutory provisions, it may not be improbable that the statutory modes of vacating judgments prevail before justices.

As the injunction was erroneously granted, this Court will affirm the order dissolving it with costs.

Per Curiam.—The judgment is affirmed accordingly.

J. M. Flagg, for the appellant.

A. Ellison, for the appellee.

HARRISON v. PRICE.

ACTION FOR CRIMINAL CONVERSATION.—In such an action it is not competent for the defendant to plead in bar a want of virtue in the plaintiff and his wife, and it does not need to be pleaded at all in order to authorize evidence of the fact to be produced in mitigation of damages.

PRACTICE—BILLS OF EXCEPTIONS.—Where special leave of the Court is given to file bills of exceptions on or before the first day of the next term, and such bills are not filed within that time, but are filed thereafter *during* the next term, without any further leave of the Court as shown by its record, such bills will not be considered as any part of the record in this Court. This Court will not presume that further time was given, even if the Court below had power to grant it.

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137	507
22	165
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NEW TRIAL—MISCONDUCT OF JUROR.—The misconduct of a juror, in order to be sufficient to justify the granting of a new trial, must be gross and must have resulted in manifest injury to the complaining party. The mere fact that a juror, pending a trial, and whilst the jury were separated for dinner, expressed the opinion that the jury would find for the plaintiff, without other improper conduct, would not be sufficient ground for a new trial.

APPEAL from the *Hamilton Circuit Court*.

PERKINS, J.—*Isaac C. Price* sued *Thomas J. Harrison* to recover damages for criminal conversation had between said *Harrison* and the wife of said *Price*; and he recovered 900 dollars. A demurrer was sustained to a paragraph of the defendant's answer, setting up want of virtue in *Price* and wife. That paragraph purported to go in bar of the action. It contained no matter in bar; at most, but matter in mitigation of damages. Such matter is not pleadable at all, so far as we are aware, in an action for criminal conversation, and is not necessarily pleaded in any action, in order to its being given in evidence. See *Swinney v. Nave et ux.*, at this term.

Harrison moved for a new trial for the following reasons, which motion the Court overruled:

1. For misconduct of one of the jurors.
2. On account of surprise at the testimony of two witnesses, touching the number of conversations he had had with *Price*, and the fact of his having written notes to *Mrs. Price*.
3. For errors of law occurring on the trial.
4. Because the verdict is not justified by the evidence.

We will notice these grounds for a new trial in the inverse order of the assignment.

We can not consider the fourth, because the record does not purport to contain all the evidence.

We can not consider the third, because the record does

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not show that errors complained of, as occurring on the trial, were excepted to at the time.

The cause was heard in parts by two judges, in the Circuit Court, after having been certified, by mutual consent of the parties, from the Common Pleas, in which Court the action was commenced.

At the *September* term, 1861, *John Davis, Esq.*, an attorney of the Court, presided, and ruled upon the demurrers, and sustained a motion of defendant, *Harrison*, to suppress the depositions of *Elizabeth Foster* and *Margaret Price*.

At the *March* term, 1862, Judge *Buckles* presided at the trial of the cause, and took the motion for a new trial, made at that term, under advisement till the next term, and gave special leave to the defendant till the first day of the next term to file bills of exception to the rulings made at that term. This leave appears of record. Neither on the first nor any other day of the said next term was an extension of time for filing the bills asked, nor does the record show that any extension of time was given by the Court, even conceding the power of the Court, for the purposes of this case, to make such extension. But on the 10th day of that term, says the clerk, the bills were filed. The bills, then, were not filed within the leave granted by the Court, and, hence, were not a part of the record, unless the fact that they were filed in term time raises the presumption that an extension of time was granted by the Court, if such extension could be granted. If the bills had been filed at the term of the Court at which the exceptions were taken such presumption would arise from the fact of filing. *Johnson v. Bell*, 10 Ind. 863. As they were not filed till after the expiration of that term, such presumption did not arise. There are two modes of giving time to file bills of exceptions, general and special; the former relates to time given in the term at which the exception is taken, may be given by parol, and, hence, may

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be presumed to have been given. The latter relates to time given extending beyond the term at which the exception is taken, and must be given specially, and appear by entry on the record. The code provides, 2 G. & H. p. 209, § 343, that "the party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the Court." The Court must evidence this special leave by an entry of record. The Court speaks, after the term, by its record. This is the law, and it may be a necessity where different judges hear different parts of a cause, and an appellate Court reviews the whole. This disposes of all of the bills of exception except that filed on the overruling of the motion for a new trial. It does not appear, therefore, that the alleged errors at the trial were excepted to at the time. Perhaps the objection as to the misconduct of a juror, and the point as to the surprise, appear in that. At all events, without so deciding, we will notice them, as if they did appear.

1. The misconduct of the juror. It consisted in this: During the time of the hearing of the evidence on the trial, while the jury were temporarily separated, perhaps, for dinner, *Thomas J. Reed*, one of the jurors, asked one *John J. Justice*, a stranger, how he thought the case would go. *Justice* replied to him that from outside rumor the jury ought to find for the defendant, but from the appearance of the jury, he thought it would find for the plaintiff. *Reed* replied, "yes, by God, I know it will."

We do not think any cause is here shown which would justify a Court of error in reversing the judgment of the Court, which heard the evidence and was satisfied with the verdict, in refusing to disturb that verdict. *Blackstone* says, it must be gross misconduct of the jury, and that that misconduct must have injured the complaining party. 2 Black. Com. p. 387, *et seq.* See, also, 2 Graham & Wat. on New

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Trials, p. 572, cited by counsel on both sides. Also, 3 Ind. 577.

Nothing appears showing that *Reed* was not a competent juror; nothing showing any tampering with the jury; nothing showing corruption; nothing showing that the deliberations of the jury were interfered with, or were improperly conducted, as to the defendant. Suppose the idea had arisen in the mind of the juror, *Reed*, without having had a word with any of his fellow jurors, from the impression he had observed the evidence was naturally making upon them, that their verdict would be for the plaintiff, but he had not given utterance to the thought to any one, till after the verdict, and then had said to some one that he knew, before the evidence was through, that the verdict would be for the plaintiff; would the verdict have been set aside for that? He could not help the involuntary action of his own mind. Now, all the difference is, in the case as it stands, that he indiscreetly uttered that idea before the trial was completed; but he did not so utter the thought as to influence the verdict or injure the defendant. He committed a contempt of Court, but that was not necessarily a ground for a new trial.

2. As to the surprise at the testimony of *Price* and *Jame-son*, touching the number of conversations *Harrison* had had with plaintiff, and the fact as to his having written notes to his wife. *Harrison's* own deposition, taken a month before the trial, was in evidence. He testified as to the number of these conversations, and that he had never written a note to *Mrs. Price*. On the trial, witnesses testified that he had written notes to her and that he had had four conversations with *Price*. He says, if a new trial is granted he will reaffirm his former statement and bring another witness to contradict *Price* on one point.

Now, all this fails to show, we think, a case of legal surprise; and the remedy for it, proposed, according to his

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affidavit for a new trial, is only by again contradicting, by cumulative evidence, the statements already once contradicted; but new trials are rarely granted to enable witnesses to be impeached, or for the production of merely cumulative evidence, nor where the proposed additional evidence will not probably change the result of the case. See 2 G. & H. p. 211, *et seq.*, notes.

If, in this case, we regard the record as containing all the evidence, the verdict seems to be, beyond question, right against the defendant for some amount; and as we do not regard the evidence as in the record, we are bound to presume the verdict right; and without the evidence given, we could not say the proposed evidence would change it. We can not regard the damages excessive.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Joseph E. McDonald, A. L. Roache and D. Moss, for the appellant.

Hendricks & Hord, for the appellee.

McCLINTIC'S Administrator v. CORY et al.

PLEADING.—Want of consideration and failure of consideration are not identical in their nature, and may be separately pleaded in answer to the same action.

PLEADING.—An answer setting up a matter by way of counter-claim as a bar to the whole cause of action, which is sufficient only to bar a part of it, is bad.

CONTRACT—PAROL EVIDENCE TO VARY.—Where a note is executed by A to B, which is absolute and unconditional upon its face, and it is agreed between them at the time, by parol, that the note shall

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not be paid unless a certain other note, then transferred by *B* to *A*, could be set off by *A* against *C*, the payor of the latter, whom *A* owed at the time, and *A* fail to secure the set-off against *C*, and *B* sue *A* on his note, such parol contract can not be pleaded to show a failure of the consideration of the note of *A*, and such cotemporaneous parol agreement would not be admissible in evidence to contradict or vary the terms of the note.

APPEAL from the *Jackson Common Pleas*.

WORDEN, J.—Action by the appellant against the appellee upon a promissory note of the following terms:

"\$233 98. *Reddington, Ind., June 11, 1861.*

"Twenty days after date, we promise to pay to the order of *John C. Prather*, administrator *de bonis non* of the estate of *J. T. McClintic*, deceased, 233 dollars and 98 cents, without defalcation, value received, without any relief whatever from valuation, appraisement, or stay laws.

"NOAH CORY.

"S. VOORHEES."

Issue, trial, verdict, and judgment for the defendants.

The first error assigned is, that the Court refused to compel the defendants to elect between the 2d and 3d paragraphs of their answer. The second paragraph will be noticed at large hereafter. The third alleged that the note was given without any consideration. The paragraphs were substantially different, and in respect to the point now under consideration, the Court committed no error. Even if the second be regarded as a plea of failure of consideration, we see no good reason why want of consideration may not also be pleaded.

The second error assigned is in the overruling of a demurrer to the second paragraph of the answer. This brings us to the important question in the cause, as the verdict seems

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to have been found upon the matters set up in this paragraph.

The paragraph in question alleges, in substance, the following facts:

Cory was principal, and *Voorhees* surety, upon the note in suit. *Prather*, the plaintiff, as surety, and one *James D. Cutter*, as principal, (the latter of whom having died insolvent at the time the note in suit was given,) had executed a promissory note to a former administrator of the estate of *McClintic*, for the same amount as that in suit. The note thus given by *Cutter*, with the plaintiff as surety, afterwards came into the hands of the plaintiff as part of the assets of said estate. *Cory*, as principal, and *Voorhees*, as surety, had executed a promissory note to the said *Cutter*, for 1000 dollars. The plaintiff, as such administrator, indorsed the note thus held by him as assets, and transferred the same to *Cory*, for which *Cory*, with *Voorhees* as his surety, executed the note in suit. Concurrently with, and as a part of the transaction, it was understood and agreed between the plaintiff and *Cory*, if the latter should succeed in setting off the note thus assigned to him by the plaintiff, against the note which he and *Voorhees* had executed to *Cutter*, then the defendants were to pay the plaintiff the amount thereof at the expiration of one year from the time the same should be set off, without interest; but if *Cory* should fail to make the set off, then the note was to be returned to the plaintiff, who was to pay costs, attorney's fees, &c., and the note sued on was executed to show the amount which would be due from *Cory* in the event that he should be able to make the set off. The note from *Cory* and *Voorhees* to *Cutter* had been assigned to one *Billings*, who sued upon it, and *Cory* failed to make the contemplated set off. It is alleged that the costs in attempting to enforce the set off amounted, with attorney's fees, to 150 dollars. The note thus transferred to *Cory* has been stolen and can not,

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therefore, be returned to the plaintiff. The paragraph commences "by way of counter-claim," and concludes by alleging "that the said note was given for the above consideration and no other whatever, and the same has wholly failed; he, therefore, asks judgment for 150 dollars."

If we regard the paragraph as a counter-claim merely, it is bad, because the matter set up by way of counter-claim is only 150 dollars; much too small a sum to bar the claim to which it is pleaded. This being the case we need not decide or discuss the question whether an agreement by the plaintiff to pay the costs and expenses in attempting to enforce the set off, which he must have made in his individual capacity, having no right to bind the estate in that respect, could be made the subject of a counter-claim against a note executed to him as such administrator. We may remark, however, that an agreement on the part of the plaintiff to pay costs and expenses in attempting to enforce the set off, in no wise varies or contradicts the note in suit, and if it had been pleaded to so much only of the complaint as the costs and expenses amounted to, we see no reason why the answer would not have been valid, unless, indeed, it would have been bad on the ground that the note was given the plaintiff in a fiduciary capacity. As it is, the paragraph was clearly bad as a counter-claim. It does not seem to have been treated below as a counter-claim. There was a general verdict and judgment for the defendants. The paragraph was regarded as going to the entire action. The question arises whether the paragraph shows a failure of the consideration of the note in suit. How is such failure attempted to be shown? Simply by alleging that coterminously with the execution of the note, it was agreed between the parties, by parol, that in the event that *Cory* should fail to make the set off, the note assigned to him by the plaintiff should be returned; and the note in suit to be paid only on condition that the set off

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should be made. The note in suit is for the payment of a definite sum, at a specified time, absolutely and unconditionally. The defence set up may be called a failure of consideration, but it is nothing more than an attempt, under that name, to break through the rule, as well established in this State as elsewhere, that parol evidence of a cotemporaneous agreement of the parties, can not be received to contradict or vary the legal effect of a written instrument. The numerous cases on this subject in our own reports will not be here collected; they may be found running through nearly every volume.

What was the consideration of the note in suit? It was, undoubtedly, the transfer by the plaintiff to *Cory*, of the *Cutter* note. It is not disputed that *Cory* received the entire interest in, and title to, the latter note, and the benefit of whatever obligation the plaintiff assumed by indorsing it. This consideration has in no manner failed.

The object that *Cory* expected to accomplish by purchasing the note, failed; but it can not thence be said that the consideration failed. The object or purpose which a man has in view in buying a given article, forms no part of the consideration which he pays for it. A few cases may be cited to show that such a defence as is here set up, can not prevail on the ground of a failure or want of consideration.

In *Harvey v. Laflin*, 2 Ind. 478, suit was brought on a note executed by the defendant to the plaintiff, for 295 dollars. The defence set up was, that one *McClary* was indebted to the plaintiff and the defendant, as parties, in the sum of 1100 dollars, for which amount *McClary* had executed his note to the defendant alone, but for the benefit of both plaintiff and defendant. On a settlement of accounts between plaintiff and defendant, it was ascertained that there would be due to the plaintiff, out of the sum owed by *McClary*, 295 dollars; thereupon, for the purpose of furnishing the plaintiff with evi-

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dence of the interest which he thus held in the *McClary* note, and for no other purpose, the note sued on was executed, with an understanding that it was to be paid only when the debt due from *McClary* was collected; that although diligence had been used to collect the *McClary* note, it remained unpaid, and *McClary* was insolvent. It was held that no want of consideration was shown, and that parol evidence was inadmissible to contradict the note. As well might it be claimed in the case above cited, that the note sued on was given in consideration of the money which the defendant expected to collect from *McClary*, and that not being able to collect it, the note in suit was without consideration, or that the consideration had failed, as it can be in the case at bar, that the consideration has failed. Again in the case of *Columbia v. Amos*, 5 Ind. 184, suit was brought upon a note. The defence was that the note was given for a sick stallion; that it was agreed at the time the note was executed that it should not be paid unless the stallion got well; and that the stallion did not get well. The defence was held bad. It might as well be said in this case that the note was given for the stallion if he got well, and that the consideration failed because he did not get well, as to claim a failure of consideration in the case at bar.

Going out of our own State, we find that the case of *Allen et al. v. Furbish*, 4 Gray, is strikingly in point.

The suit was upon a promissory note given by the defendant to the plaintiff. The defence set up was that the defendant bought a horse of the plaintiff, paid a part of the price down and gave the note in suit for the residue; that it was agreed at the time of the purchase, as an inducement to the bargain, that if the defendant should be dissatisfied with the horse within three months, he might return it to the plaintiff, rescind the contract, and receive the note and money; that the horse was bought upon that condition; and

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that within a week after the purchase, the defendant was dissatisfied, took the horse back and offered it to the plaintiff and demanded the money and note, but the plaintiff refused to receive him. The ground taken there, by counsel, was that the parol evidence did not tend to affix any condition to the note, but established a failure of consideration. It was held, however, that no failure of consideration was shown, and that the parol evidence was inadmissible to defeat the note.

The counsel for the appellees claims that there was a failure of consideration, and has put some cases that are supposed to be analagous, to show that parol evidence may be received. He puts the case of an unconditional note being given for the price of a horse warranted sound, the warranty existing in parol only, and assumes that the breach of the warranty may be set up as a defence to the note, without violation of the rule that excludes parol evidence to contradict or vary the terms of the note. This all may be. The defence of a breach of warranty does not go to the consideration of the note, nor does it attack the validity of the note in any manner whatever; it does not go to contradict its terms or legal effect. Such defence rests exclusively upon the ground that as the plaintiff has broken his contract, the defendant has a right of action against him; but the Court, to avoid circuity of action, will permit the defendant to set up what damages he has sustained by the breach of warranty, in an action against him on the note. *Comparet v. Johnson*, 6 Blackf. 59. In the case before us, it is not alleged that the plaintiff made any warranty that *Cory* should be able to make the intended set off.

Again, the case is put of a purchaser of land under a general warranty deed, who gives an unconditional note for the purchase money, and is ousted by one having a superior title. It is claimed that the facts can be set up as a defence to the note without violating the rule. No doubt the defence is

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available, but it does not go to the consideration of the note, nor does it contradict or vary its terms. The defence rests exclusively upon the breach of the grantor's covenants. This is shown conclusively by the fact that, if the purchaser has no covenants of warranty, he has no defence to the note he has given. *Laughery v. McLean*, 14 Ind. 106.

In any view we can take of the case, it seems to us that the defence set up, so far as it is intended to defeat the note, is in violation of the rule adverted to, and the pleading consequently bad.

The rule may seem to operate harshly in particular cases, but it is universally established where the common law prevails, and no doubt its general effect is salutary and beneficent.

If parties, notwithstanding the rule, see proper to rest their contracts partly in writing and partly in parol; to attach and rely upon parol conditions inconsistent with their written stipulations, when they might as well have had them "nominated in the bond," they can not expect the Courts to violate the rules of law for the purpose of extricating them from the difficulties in which their own want of care and prudence has placed them.

The error in overruling the demurrer to the paragraph of the answer in question, is the first that occurred in the proceedings, hence we need not examine any further errors assigned.

Per Curiam.—The judgment below is reversed, with costs. *Francis T. Hord*, and *Martin Ferris*, for the appellants. *William K. Marshall*, and *R. M. Patrick*, for the appellees.

Swinney v. Nave et al.

SWINNEY v. NAVE et al.

SLANDER—PLEADING.—In complaints for slander, the words spoken should not be alleged with a *continuando*. Slanderous words spoken at one time, constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action, but if relied upon, they should be separately pleaded in separate paragraphs.

SAME.—It is unnecessary, but admissible, under the code, to answer in mitigation in actions of slander. Matter in mitigation may be given in evidence under an answer in justification.

PRACTICE—BILLS OF EXCEPTIONS.—A bill of exceptions can not be filed by the judge, after the time given by the Court in term; at least without the consent of all the parties.

SAME.—A motion to strike out a part of a pleading need not be in writing unless required by a rule of the Court in which it is made, and error in overruling such motion should be taken advantage of by bill of exceptions.

APPEAL from the *Allen* Circuit Court.

PERKINS, J.—This was an action by *Nave* and wife against *Swinney*, charging him with slandering *Mrs. Nave* on, &c., “and at divers other times,” by speaking, &c.

The defendant moved to strike from the complaint the words “and at divers other times,” and the Court overruled the motion, if the clerk is to be believed, but the Court has not so stated in any bill of exceptions.

There was a trial, resulting in a verdict and judgment for the plaintiffs for 1000 dollars.

Touching the bill of exceptions which is copied in the record, the clerk, in return to a *certiorari*, says: “That in the month of *November*, or in the early part of *December*, 1862, I was directed by an attorney of defendant, *Swinney*, to make a certified transcript of the papers and proceedings in this case; that among those papers was one purporting to be a

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bill of exceptions, filed *June 28, 1862*, but the same was not signed by the judge of the Court. The bill was afterwards taken from the office by said attorney and subsequently returned to it, changed, to some extent in its contents, and signed by the judge of the Court, when it was recorded in the transcript as it now appears, purporting to have been filed, and signed *June 28, 1862.*"

The cause was tried in the *Allen* Circuit Court, *April 28, 1862*, and *seventy* days were given within which to file a bill of exceptions.

It is thus plain that the perfected bill of exceptions was not legally placed upon record.

A bill of exceptions can not be filed by the judge himself, at all events, without the consent of both parties to the cause, after the time fixed in term time, being the term at which the cause is tried, has elapsed; 19 Ind. 188; *id.* 178; if such expiration occurs in vacation. If a motion is made to strike out a part of a pleading, and exception is taken to the ruling of the Court on such motion, the facts should be shown by a bill of exceptions. See *Matlock v Todd*, 19 Ind. 180.

Such motion to strike out need not be in writing unless a rule of the Court in which it is made requires that it should be.

In this case the motion to strike out should have been sustained. Slanderous words spoken at a given time, including all such spoken at one time, constitute one cause of action. The same or other slanderous words, spoken at another time, constitute another cause of action: see Digest, tit. Libel and Slander; and though in a suit for slander, the plaintiff should, according to the spirit of the code, include all causes of action for slander, against the defendant up to the commencement of the suit, yet each cause should be set forth in a separate paragraph, to avoid the vice of duplicity. Trespass upon real estate may be laid with a *continuando*. 1 Chit. Pl. 394.

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So, it is said, may criminal conversation, the wrong complained of not being the assaults on the wife, in such action, but the consequent corruption of the body and mind of the wife. 2 Chit. Pl. 643, note. But, says Chitty, vol. 1, *supra*, where the act complained of is single in its nature, as an assault, &c., it is ground for special demurrer, if it be laid to have been committed on divers days and times. See *Mitchell v. Neale*, Cowper 828, *English v. Purser*, 6 East. Rep. 451. Duplicity in pleading is the including, even though stated with technical deficiency, two substantially good causes of action or defence in one paragraph. *Thompson v. Oskamp*, 19 Ind. 399, lays down this point inaccurately. Steph. on Pl. 259. But the objection is not available when raised for the first time on appeal.

As to suits for tortious injuries to the wife, and proper complaints for such, see *Rogers v. Smith*, 17 Ind. 323.

It is not necessary, though permitted by the code, to answer in mitigation in actions of slander. Matter in mitigation may be given under an answer in justification. See Dig. tit. Libel and Slander. The provision in the code allowing answers in mitigation was proper in *New York*, under the decisions in that State upon the common law rule of evidence, but was unnecessarily copied into our code.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages, and costs.

Moses Jenkinson and *L. C. Jacoby*, for the appellant.

William S. Smith, and *John Morris*, for the appellees.

The Southern Bank of Kentucky v. The Ohio Insurance Co. et al.

THE SOUTHERN BANK OF KENTUCKY v. THE OHIO INSURANCE
COMPANY *et al.*

RECEIVERS—LIEN OF JUDGMENT.—The lien of a judgment upon the real estate of a corporation is not lost or affected by the subsequent appointment of a receiver to settle the business of such corporation; nor is the judgment-plaintiff thereby prevented from proceeding by execution, levy and sale of such property to make his debt.

APPEAL from the *Floyd* Circuit Court.

WORDEN, J.—This was a petition filed by the appellant, which alleged that on the 12th of *October*, 1861, the appellant recovered a judgment in the *Floyd* Court of Common Pleas against the *Ohio Insurance Company* and one *Patterson*, for the sum of 10,787 dollars and 48 cents and costs of suit, which judgment remains unpaid; that at the time of the rendition of the judgment, the Insurance company was the owner in fee of a large amount of real estate in the county of *Floyd*, of the value of at least 20,000 dollars, on which the judgment mentioned was the first lien of any kind whatever; that on the 28th of *October*, of the same year, by the consideration of said *Floyd* Circuit Court, the affairs of said Insurance company were put into the hands of a receiver, viz.: *James M. Haines*, who still continues to control the same, under the direction of the Court; that the receiver, as appears by his current report, has in his hands, as such receiver, the sum of 28,000 dollars, which the petitioner claims ought to be applied to the payment of the judgment which is the first lien upon the real estate of the Insurance company. Prayer, that an order be made directing the receiver to pay the judgment before any of the funds be applied to the payment of any other debts of the corporation.

The Court below refused to grant the prayer of the peti

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tioner, but directed the receiver to pay 20 per cent. on certain claims referred to in the report of a master.

The appellant excepted to the ruling, and brings the case here for revision.

We have not been furnished with any brief on the part of the appellee, and are not advised upon what ground the case was decided below. We presume, however, that the decision was not placed upon the ground that the bank had lost her lien upon the real estate in consequence of the affairs of the Insurance company having been placed in the hands of a receiver, and that she was only entitled to a *pro rata* share of the assets. The statute provides that, "all final judgments in the Supreme and Circuit Courts, and Courts of Common Pleas, for the recovery of money or costs, shall be a lien upon real estate and chattels real liable to execution in the county where the judgment is rendered, for the space of ten years after the rendition thereof," &c. 2 G. & H. p. 264. On general legal principles, the lien thus created by the statute can not be destroyed by the insolvency of a corporation against which a judgment may be rendered, and the placing of her affairs in the hands of a receiver; and we are not advised of any statute having that effect. 2 Story's Eq., §§ 829, 830; *Hubbard v. Guild*, 2 Duer. 685.

Although the lien of the appellant was in no manner impaired by the appointment of the receiver, still we do not think any error was committed in the ruling of the Court below.

We do not see any sufficient reason for the appellant's application to the Court for the payment of her judgment out of the funds in the hands of the receiver. For aught that appears the appellant could, and yet can, enforce her claim, and avail herself of the benefit of her lien, in the ordinary mode, by execution, levy and sale of the property on which her judgment is a lien. The appointment of a receiver does

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not prevent such levy and sale. *Albany City Bank v. Schermerhorn*, 9 Paige 372; Edwards on Receivers, 146. Such levy and sale in no manner interferes with the possession of the receiver; and if the purchaser would have to apply to the Court by which the receiver was appointed for possession, the Court would award it, the judgment lien being the oldest. Case in 9 Paige, *supra*; *Ohio, &c. Co. v. Fitch*, 20 Ind. 498.

If the funds in the hands of the receiver had arisen from a sale of the land on which the appellant's judgment was a lien, a different question would have been presented; but such does not appear to have been the case.

As the appellant can avail herself of the process of execution and thereby enforce her lien, and as the funds in question have not arisen from the sale of the property on which her lien exists, we see no good reason why those funds should be applied first to the payment of the judgment.

Per Curiam.—The judgment below is affirmed, with costs.
R. & H. Crawford, for the appellant.

DURBON et al. v. KELLEY's Administrator.

PLEADING—SET OFF.—As to the requisites of an answer by way of set off, under section 58, 2 G. & H. 89, see the opinion herein.

APPEAL from the *Clinton Circuit Court*.

HANNA, J.—Suit by *Miller*, assignee, on a note and mortgage. Answer, by way of set off, that said note and mortgage were executed by *Durbon* to one *Kelley*, the assignor of said *Miller*; that afterwards, *John W. Blake*, *Isaac D. Armstrong* and said *Kelley* executed a joint note to one *Clark*, who

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assigned the same to said *Durbon*, before said *Durbon* had any notice of the assignment by *Kelley* to plaintiff of the instruments sued on; that said *Blake* and *Armstrong* were, at the time said *Durbon* acquired title to said note, and still continued to be, wholly insolvent; nor did they, during any part of said time, own jointly any property subject to execution. Offer to set off, &c.

To this a demurrer was sustained. This ruling presents the only point in the case.

It will be perceived that there is no averment that said *Kelley* was the principal in said note. Indeed, so far as the note shows, the makers were all equally liable. This does not make a case within section 58 of the code. It has been held that mutuality, as a law of set off, still prevails, except as otherwise provided by the code. *Knour v. Dick*, 14 Ind. 20; *Blankenship v. Rogers*, 10 id. 333. The demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed, with five per cent. damages, and costs.

R. P. Davidson, for the appellant.

S. C. Willson, and *Claybaugh & Simms*, for the appellee.

JONES v. DIVER.

SLANDER.—To say of a physician that, "in my opinion the bitters that *A* fixed for *B* were the cause of his death," is not actionable *per se*, and such words do not, in their usual sense, import a charge of murder.

SAME.—But the words, pleaded with a proper colloquium, that "the bitters that *Dr. Diver* gave to *John Smith* caused his death; there

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was poison enough in them to kill ten men," are actionable *per se*, because they imply a charge of gross misconduct and complete unfitness of the physician to be employed in his profession. Where words spoken of a professional man only impute ignorance or want of skill in a particular case, they are actionable only where they cause special damage.

APPEAL from the *Tipton* Circuit Court.

PERKINS, J.—*John C. Diver* sued *Matthew M. Jones* for slander.

The complaint contained two paragraphs. The first averred that the defendant said of the plaintiff, "in my opinion the bitters that *Diver* fixed for *Smith* were the cause of his death;" and the paragraph averred that *Jones* used the words in a criminal sense, intending to charge *Diver* thereby with the murder of *Smith*, and that so the hearers understood, &c.

The words do not, in their usual sense, import a charge of murder; and there is no colloquium showing that they were used in a conversation about *Smith* as having been murdered, &c., so as to give the words a particular signification as used in the given case. There should have been, to render the paragraph valid as charging slander, *per se*, of an individual, simply as such. The paragraph was bad upon demurrer. *Dodge v. Lacey*, 2 Ind. 212; *Stucker v. Davis*, 8 Blackf. 414. The second paragraph of the complaint averred that the plaintiff, *Diver*, was a practicing physician, living upon his professional earnings; that as such, he attended upon and administered to *Smith*, a sick patient; that he gave him a liquid preparation, as medicine; that he died under the attendance; and that, maliciously, &c., speaking of such attendance, medicine and death, *Jones*, the defendant, in the presence, &c., to injure, &c., said "the bitters that *Dr. Diver* gave to *John Smith* caused his death. There was poison enough in them to kill ten men." The paragraph averred special damage in the loss of practice, but did not specify particulars.

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This paragraph was good upon demurrer; but, on motion, the allegations as to special damage, might have been made more certain by specification of patrons lost, &c.

There were issues of fact, trial and judgment for plaintiff for 250 dollars.

There being one good paragraph in the complaint, it will support the judgment. We have said that the second paragraph of the complaint was sufficient. It complains of a charge made against the plaintiff as a physician; made against him touching an act performed in the practice of a profession which he follows for a livelihood, and for services in which he is entitled to compensation. The charge was not made upon a justifiable occasion, as in giving testimony, or information in a proper case. And charges against a professional man, as such, calculated to destroy his business, may be actionable, *per se*. *Craig v. Brown*, 5 Blackf. 44. It was held in *Fost v. Brown*, 8 John. Rep. 64, that when words used, only impute ignorance or want of skill in a particular case named, they are actionable only when they cause special damage; and in the case at bar special damage is alleged; but it is held in *Lecor v. Harris*, 18 Barb. Rep. 425, that the charge of gross misconduct professionally in a particular case may be actionable *per se*, as clearly implying an unfitness of the malpractitioner for general employment in his profession. In the case last cited, the later authorities are collected, and they support the ruling there made.

Words actionable *per se* are not confined to such as charge crime or whoredom. *Nichols v. Guy*, 2 Ind. 82.

It is urged by the appellant that the evidence does not support the judgment; but the evidence certainly tends to prove the second paragraph of the complaint, both as to the words charged, and the circumstances under which they are alleged to have been used. Where such is the fact in a case, the appellate Court feels bound to respect the finding of the

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jury, and the judgment of the Court below as to the question of proof.

Per Curiam.—The judgment below is affirmed, with 5 per cent. damages and costs.

N. B. Lindsay and *John Green*, for the appellant.

Joseph E. McDonald and *A. L. Roache*, for the appellee.

THE BOARD OF COMMISSIONERS OF BARTHOLOMEW COUNTY v.
WRIGHT.

PAUPERS—COUNTY POOR.—It is not the intention of the poor laws of this State to require that all persons needing temporary relief shall be removed to the county asylum before receiving it.

SAME—STATUTES CONSTRUED.—It is the obvious general purpose of the poor laws of this State to make the mode of giving relief to paupers a county system and not a township system, and to make the township trustees subordinate to the county commissioners.

SAME.—If a claim for services rendered to the poor of a county or township be disallowed by the county board, in whole or in part, the claimant may appeal, or, at his option, bring an action against the county.

APPEAL from the *Bartholomew* Circuit Court.

HANNA, J.—*Wright* sued the appellants for medical services rendered to two persons "who were in, and *bona fide* residents of, *Columbus* township, in said county, and were a temporary charge as paupers on said county and township, and were not in the poor house or jail, nor was there any physician employed by the county whose business it was to attend upon them, and said services were rendered at the request and under the employment of the trustee of said township," &c.

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There was a demurrer overruled to this complaint, and upon that ruling the first point is made.

It is not averred that there was a poor house, or asylum, in the county; if it appears at all from the complaint it is only inferentially.

It is not clear, therefore, that, upon the demurrer to the complaint, the question argued, and a decision of which is sought, is presented; but as the same question is raised by certain paragraphs of the answer, we will examine it. That question is, whether a resident of a township, who may become temporarily, as in this case by small pox, a charge upon the public, must be taken to, and furnished with the needful help by those employed at the county asylum.

It has been decided, 20 Ind. 250, that persons not inhabitants, &c., who may become a temporary charge upon the public, are so far county paupers, as to be entitled to the benefits of the county asylum, and that the superintendent is bound to receive them as such, under section *thirteen*, which authorizes overseers of the poor to place temporary paupers, not residents of the township, in the asylum.

It has also been held that an employment of a physician to attend upon the poor generally of the county, does not make it his duty to attend upon a non-inhabitant who may become a temporary charge, and not taken to the asylum. 17 Ind. 343. Still, neither of these cases decides whether a resident who may become a temporary charge, must be removed to the asylum, in instances when it can be done.

It is urged that this is the proper construction of the whole statutes upon the subject of the poor, especially in view of questions of economy.

It is well decided in the case cited from 17 Ind. that the general system provided for extending relief to the poor, in a county, has reference only to the poor, resident in such county; that any relief extended to transient persons is but exceptional

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to such general system. In view of this it would, therefore, be presumed that contracts would be made with reference to the persons who might legally be placed by the authorities in the asylum. The record would show who, and how many persons, were permanently on the books as paupers. As a general proposition it is provided that those who are permanent paupers shall be taken to the asylum when one is prepared. If temporary paupers must be placed in the asylum we do not well see upon what basis a bidder would make his calculations as to the amount for which he would be willing to keep the poor of the county, unless such bids should be for each person by the day or week, which, we believe, is not in accordance with the usual course pursued.

We are, upon the whole, inclined to the opinion that it was not the intention of the framers of these statutes that residents, requiring mere temporary relief, should necessarily be removed, before receiving the same, to the asylum. To this effect is the intimation in *The Board v. Wheelodon*, 15 Ind. 148, and *The Board v. Saunders*, 16 Ind. 405.

The question of whether it would be the duty of a physician, employed by the county to attend generally to the paupers thereof, or of a township, to render service to such persons as the overseer might deem to be temporarily entitled to aid, is not here involved, for it is not averred that a physician had been so employed.

Another question is argued as being raised by the demurrer, and that is, the right of the plaintiff to sue the defendants for the services, conceding the same to have been rendered under a proper employment by the township trustee. It is insisted that, as the employment was by the township trustee, and as the township is a corporation for which the trustee acts, he alone, in his official capacity, or the corporation, is responsible for the employment; that whatever may be said as to the ultimate responsibility of the county is

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with reference to such responsibility to the township, and not to the individual by the latter employed.

This proposition is based upon the first section of the act, 1 G. & H. 493, which makes trustees of townships overseers of the poor; the sixth section which gives said overseers the oversight of all poor persons in the township; the nineteenth section which makes it the duty of the overseers to make a return to the county auditor of the sums of money required for the poor of their respective township, within fifteen days after every such contract herein provided for shall have been made; and the twenty-second and twenty-third sections, which provide for annual settlements of each trustee with the county commissioners.

The point is pressed upon the nineteenth section, in connection with the others, that, without doubt, the return therein named is in regard to contracts made by overseers for the yearly keeping of paupers where no asylum exists in a county. By section seven, it is made the duty of the overseers to give public notice, in such instances, and receive and act upon sealed proposals, to take care of paupers resident in each township.

But the whole tenor of the act shows that the system of relief is a county system, not that of townships. The township and township officers are made the subordinate mediums through which the county acts for the benefit of this unfortunate class of persons. By section four it is said: "Every county shall relieve and support all poor and indigent persons lawfully settled therein." By the sixth section, they are spoken of as a "county charge." By the thirty-fifth section the board of county commissioners is authorized to levy a tax for the support of the poor. If the township was liable to pay for the support of the poor therein, in the first instance, the authority should have been given to levy the tax for that purpose. The county tax would then be to reim-

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burse to such townships the sums so advanced and not directly to support the poor.

The next point made is upon the sixth and seventh paragraphs of the answer, which set up that, at the *March* term of the Board of County Commissioners, said plaintiff filed his claim for these identical services, upon and for which an allowance was made by said Board to said plaintiff, payable out of the county treasury; that afterwards, at the *June* term in said year, the same claim for the same services was again filed before the said Board, and an allowance refused, because it had been passed upon as aforesaid at the preceding term; that plaintiff then instituted this suit thereon in the Circuit Court, said allowance still standing, &c.

These paragraphs show that the Board did not allow the full amount of the account or claim presented, which, we suppose, accounts for its subsequent presentation again. The answer is in substance a former recovery. Are the proceedings of a county board of such a character that they can, in this instance, be set up as a defence?

It has been repeatedly held by this Court that the board of county commissioners, under organizations similar to that which now exists, and with substantially the duties now devolved upon such tribunals, were and are inferior courts of record—judicial tribunals for certain purposes. The organization and duties are purely statutory. R. Stat. 1831, p. 181; R. Stat. 1838, p. 151; R. Stat. 1848, p. 183; 1 G. & H. 247; *The State v. Conner*, 5 Blkf. 326; *id.* 462; *Rhode v. Davis*, 2 Ind. 53; *The Board, &c., v. Cutler*, 7 *id.* 6; *Rosenthal v. The Madison, &c.*, 10 Ind. 361. From these adjudications, in reference to the acts of the Board under the statutes cited, and that of *Gaston v. The Board, &c.*, as to the conclusiveness of such acts, the argument is based that an allowance, or passing upon a claim, can not, in subsequent proceeding, be thus ignored. Whatever force exists in the arguments, as applied

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to the acts of this tribunal, we need not determine, it appears to us, in view of section ten of an act to authorize and limit allowances by courts and boards, 1 G. & H. 64, which provides for appeals, &c., and: "If a claim be disallowed in whole or in part, the claimant may appeal; or, at his option, bring an action against the county."

Per Curiam.—The judgment is affirmed, with 3 per cent. damages, and costs.

Francis T. Hord, for the appellant.

N. T. Hauser, for the appellee.

GREEN v. THE CITY OF INDIANAPOLIS.

PLEADING.—In an action to recover the penalty for the violation of a by-law or ordinance of a city, a copy of the by-law or ordinance should be made a part of the complaint and filed with it.

APPEAL from the *Marion* Common Pleas.

PERKINS, J.—A complaint as follows was filed before the mayor of *Indianapolis*:

"STATE OF INDIANA, MARION COUNTY, ss:

"The City of Indianapolis, plt.,	} Before John Caven, mayor of the city of Indianapolis.
v.	
"Molly Green, deft.	

"The City of *Indianapolis* complains of *Molly Green*, late of said city, and says that said *Molly Green*, on the 27th day of *June*, 1863, at the city and county aforesaid, did then and there violate section nine of an ordinance of said city passed by the common council thereof, on the 4th day of *May*, 1859, a copy of which is herewith filed. The said defendant did un-

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lawfully keep a house of ill-fame and prostitution in said city of *Indianapolis*, county of *Marion*, State of *Indiana*, wherefore the plaintiff demands judgment for 50 dollars.

“R. J. RYAN, City Attorney.”

The complaint was verified.

Neither the by-law, (the ordinance on which the suit was based) nor any section of it, nor a copy of either, was filed with the complaint, or any where appears in the record. The complaint is fatally defective for this reason. 5 Blackf. 236, 8 Ind. 130, 16 Ind. 273. Ang. and Ames on Corp., 7th ed., p. 21; and also § 366. In *Stuyvesant v. The Mayor, &c., of New York*, 7 Cowen, on page 608, the Court say of the declaration in that case that it conforms in every respect to the rule laid down by Kyd, in his treatise on the law of corporation. (2 Kyd on Corp. 167.) “In an action of debt for the penalty of a by-law, the time when it was made, the parties by whom it was made, their authority to make it, the by-law itself, and the breach of it by the defendant must be set forth, that the Court may judge both whether the by-law be good, and whether the defendant be a proper object of the action.” (Vide Hut. 5, Hob. 211, 1 Str. 539, Brownl. & Gouldsb. 177.)

In this State, where municipal corporations are organized under the general law, the Court would take judicial notice of their powers to enact by-laws, but not of the fact that any given one had been enacted. As the by-law or ordinance in question, then, is not in the record, and the Court does not take judicial notice of such corporate acts, we can not pass upon its legal construction or validity. Indeed, we do not know that any such exists.

A public statute need not be set out in pleading, nor, in this State, need a private act of the legislature, 2 G. & H. p 109. But statutes of other States, relied upon must be set

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out by copy, and so must by-laws of corporations, for they are not statutes of the State.

If there was no appeal from the judgment of the mayor in these cases, it might well be that by-laws should not be set out, but should be judicially noticed by the mayor; but as appeals are allowed to the State courts, the acts of the corporation relied on as foundations of suits or defences must be set out in the pleadings, and proved on trials to bring them before appellate courts.

The record before us shows no cause of action. It is as important that a by-law sued on be set out, as it is that a written instrument should be.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

J. N. Sweetser, for the appellant.

R. J. Ryan, and *J. C. Bufkin*, for the appellee.

WELBORN v. SWAIN.

DEPOSITIONS—PRACTICE.—Where the certificate to a deposition states that the deponent “was sworn to testify the whole truth of his knowledge touching the matters in controversy in the cause,” it should be held to be an immaterial deviation from the exact requirements of the statute in such cases.

APPEAL from the *Henry* Circuit Court.

DAVISON.—This was an action by *Swain* against *Welborn* for work and labor; for money paid, laid out and expended; for goods sold and delivered; for money loaned, and for money due upon an account stated, &c.

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Defendant answered by a denial. Verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment.

There is a bill of exceptions which shows that defendant moved to suppress the deposition of *Thomas Lewis* on the ground that the officer before whom it was taken does not state, in his certificate, that the witness was sworn to "testify the truth, the whole truth and nothing but the truth," nor that he was sworn "according to law." The certificate, however, does state that, "witness was sworn to testify the whole truth of his knowledge touching the matters in controversy in the cause aforesaid."

There is a provision of the statute which says: "An unimportant deviation from any directions relative to the taking of depositions, shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party." 2 R. S. p. 180, § 272.

We think this provision applies to the case before us. The witness was sworn to testify "the whole truth" within his knowledge "touching the matters in controversy in the cause." This, it seems to us, was substantially a swearing "according to law;" *id.* p. 176, § 258; and may be regarded "an unimportant deviation" from the literal requirements of the statute; nor does it appear that, by such deviation, the defendant was in any degree prejudiced. There being no other point made by the appellant in his brief, the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages, and costs.

James Brown and *J. B. Julian*, for the appellant.

Mellet & Martindale, for the appellees.

Conkey et al. v. Barbour.

CONKEY *et al.* v. BARBOUR.

LIMITATIONS.—In an action upon a written promise to pay a specified sum of money, which is commenced more than twenty years after the maturity of the promise, the plea of the statute of limitations is a good bar, and the mere fact that payments were made and indorsed upon the written contract within twenty years prior to the commencement of the action would not remove the bar, unless a new promise, which might be inferred from the payments, were specially pleaded by way of replication; because otherwise the evidence of such payments would not be admissible under the issues.

APPEAL from the *Vermillion* Circuit Court.

DAVISON, J.—The appellee, who was the plaintiff, sued the appellants, who were, in the year 1840, partners in business, under the name of "*McCulloch & Conkey*," upon a promissory note for the payment of 192 dollars and 23 cents. The note bears date *December 11th, 1840*, was payable to one *Egbert Hawey*, who assigned it to the plaintiff. The following is a copy of the note, and of indorsements of payment:

"\$192.23.

Clinton, December 11th, 1840.

"Due *E. Hawey* or order 192 dollars and 23 cents, value received.

McCULLOCH & CONKEY."

Indorsements: "Received *February 6, 1841*, 50 dollars; received *March 12, 1841*, 50 dollars; received *June 22, 1841*, 31 dollars; received *March 8, 1843*, 27 dollars." This suit was commenced *January 18, 1863*.

The defendants answered severally. Their respective answers are similar in form and effect, and contain: 1. A denial. 2. They respectively allege that the plaintiff's cause of action did not accrue within twenty years next before the commencement of this suit, wherefore, &c. To the second paragraphs of the answers the plaintiff replied: 1. By a denial; and 2. That the cause of action did accrue with twenty years

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next before, &c. The Court tried the issues and found for the plaintiff 120 dollars. Motion for a new trial denied and judgment.

The evidence is upon the record. It proves that the note was given by the defendants as partners, but that they dissolved their partnership in the year 1842; and, in relation to the payments indorsed on the note, the plaintiff produced the deposition of *Hawey*, the payee. He testified thus: "A part of said note has been paid. Each payment, at the time it was made, was indorsed on the note as follows: *February 6th, 1841, 50 dollars; March 12th, 1841, 50 dollars; June 22d, 1841, 31 dollars; March 8th, 1843, 27 dollars.* The several sums so paid and indorsed were paid to me personally, and indorsed on the note in my presence. The two first and the last indorsements were made by one or other of the defendants, I don't remember precisely which; but they were made at the time they respectively bear date. The other indorsement is in my hand writing." This was, in substance, all the evidence given in the cause. Was it sufficient to sustain the finding?

The suit, as we have seen, was upon a note due at date; upon an original promise in writing to pay a specified sum of money. The answer sets up, in effect, that the action upon the promise sued on did not accrue within twenty years next before the commencement of the suit. Reply that it was commenced within that period. Now it is very clear that, under the issues thus formed, the plaintiff was not, in view of the evidence, entitled to recover; because it proves that the promise relied on in the complaint was made *December 11th, 1840*, and the result is the evidence, when applied to the issues, at once shows that the action is barred by the statute of limitations. The evidence, it is true, shows a payment, on the 8th of *March, 1843*, from which a new promise may be inferred, and which would save the plaintiff's claim from the

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operation of the statute; but of this he could not have availed himself otherwise than by a replication setting up, specially, such new promise within the period limited. 2 Greenleaf's Ev., § 440. But the evidence is said to be defective upon another ground. It proves that when the last payment was made the defendants had dissolved their partnership; that that payment was by one of the defendants, but fails to designate the one who made it; hence it is insisted that no recovery can be had against the defendants, or either of them. This position seems to be correct. In *Van Keuren v. Parmelee*, 2 Comst. 523, it was decided "that one of two partners has no authority, after a dissolution of the partnership, to revive a debt against his associate by a new promise, either express or implied, from partial payment." See, also, *Pierce v. Toby*, 5 Metcalf, 168; *Barger v. Dunoin*, 22 Barb. 68; *Kirk v. Hiatt*, 2 Ind. 322. Here the finding against both defendants was plainly unsupported by the evidence, nor was either liable, because, as to which one made the payment, there was no proof.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

S. F. & D. H. Maxwell, and *McDonald & Porter*, for the appellants.

THE INDIANA AND ILLINOIS R. R. Co. et al. v. WILLIAMS.

JURISDICTION—COMMON PLEAS.—The Court of Common Pleas has no jurisdiction to enjoin the execution of process issued out of the Circuit Court. It would seem that the statute, properly construed, requires that the Circuit Court and the Court of Common Pleas shall respectively enjoin, control and litigate with reference to their own process.

The Indiana and Illinois R. R. Co. et al. v. Williams.

APPEAL from the *Hendricks* Common Pleas.

DAVISON, J.—Complaint for an injunction. The appellee was the plaintiff below, and the appellants were the defendants. It is alleged that the railway company, on *March* 5th, 1860, recovered a judgment in the *Hendricks* Circuit Court against *Williams* for 187 dollars and 71 cents, which judgment was upon an obligation on which *Williams* was surety, for one *Elisha Hornady*, who was the principal debtor to the company; that defendant, *Jorden*, being *Hornady's* agent, and having in hands means of *Hornady's* sufficient to pay the judgment for and in his *Hornady's* behalf, become replevin bail for the stay of execution on the judgment, and undertook to pay the same; that on *September* 25th, 1860, execution was issued on said judgment, which was placed in the hands of defendant, *Nichols*, the sheriff, who levied on certain personal property—describing it—which was given up by *Jorden* to satisfy the execution; that the sheriff took a bond for the delivery of the property so levied on, and advertised the same for sale, and afterwards the sale was postponed by agreement between *Jorden* and one *Clark*, the president of the company, without the knowledge of *Williams*, and the execution was, by the order of said *Clark*, returned; that on the 26th of *June*, 1861, a *renditioni exponas* was issued, commanding the sheriff to sell the property levied on, “which *vendi* is now in his hands, and which he has now levied on the real estate of *Williams*, and advertised the same to be sold on the 1st of *October*, 1862,” without first selling the personal property given up on the first execution, which property so given up was amply sufficient to satisfy said execution and all costs, &c. And the plaintiff files herewith a transcript of the several executions referred to, and prays that the sheriff be enjoined from selling said real estate, and that he be ordered to sell the personal property, &c.

Defendants demurred to the complaint, but the demurrer

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was overruled and they excepted. Proper issues having been made, the cause was submitted to the Court, who found for the plaintiff, and, having refused a new trial, adjudged that the railway company and the sheriff, *Nichols*, be perpetually enjoined from collecting the judgment of *Williams*, the plaintiff, and that he recover his costs, &c.

The judgment, which the complaint describes, was rendered in the *Hendricks* Circuit Court, and hence it is insisted that the Common Pleas had no power to enjoin or otherwise control the process of that Court. Anterior to the revision of 1852 the jurisdiction, in cases of this sort, was vested in the Court of equity. But the statutes now in force abolish all distinction between actions at law and suits in equity, and in reference to proceedings for injunctions, enact that injunctions may be granted by the Circuit Court and Court of Common Pleas in their respective counties. 2 R. S., G. & H., pp. 23, 131, §§ 1, 136. This provision simply confers jurisdiction; but does not, even impliedly, allow one of these Courts to enjoin the proceedings or process of the other. Nor does it seem consistent with any correct rule of procedure that a party, who has instituted an action, recovered a judgment and obtained final process in one Court, should be compelled to litigate matters connected therewith before a different tribunal. In *New York* it has been expressly decided, under statutory provisions, in effect the same as those to which we have referred, that "no Court of that State can rightfully enjoin a party from proceeding in a suit in another Court of the same State, having equal power to grant the relief sought by the complaint on which such injunction is asked." *Grant v. Quick*, 5 Sandf. 612; *Bennett v. LeRoy*, 5 Abbott Pr. R. 55. The principle involved in these decisions seems to apply to the case before us. Indeed, there is no legal propriety in allowing the Common Pleas, a Court of inferior jurisdiction, to enjoin and adjudicate upon the validity of process issued

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from the Circuit Court. And the statute, properly construed, in our judgment, intends that each of these Courts shall enjoin, control and litigate in reference to its own process. *Id.* §§ 136, 137. Other points are made and discussed, but the Common Pleas, having no power to hear and determine the cause, they do not properly arise in the record.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Nave & Witherow, for the appellants.

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134	642

PRACTICE.—Where the parties to a case, by agreement on the trial, refer to the jury certain questions covering the points they desire to have settled, it will not be admissible for either party to introduce evidence upon the trial not pertinent to the issues so presented.

HIGHWAYS—MEASURE OF DAMAGES.—Where land is alleged to be injured by the location and opening of a highway through it, the measure of damages will be the difference between its market value at the time with the highway, and its market value without the highway.

HIGHWAYS—PRACTICE.—An order for the location and opening of a highway, should specify the width thereof; but where such a defect exists in an order, and does not conflict with the rights of an appellant in this Court, it will not be made the ground of a reversal, but the cause will be remanded to the lower Court for the correction of its order in that respect.

APPEAL from the *Bartholomew* Circuit Court.

DAVISON, J.—*Thomas Essex* and others, to the number of eighteen, at the *September* term, 1859, filed their petition be-

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fore the Board of Commissioners of *Bartholomew* county, for the location of a public highway. The petition describes the proposed highway, names the owners of the land through which it will run, and prays the appointment of viewers, &c. The board, in accordance with the prayer, appointed three viewers, who, at the *March* term, 1860, reported that they had viewed, laid out and marked the proposed highway, and that the same, when opened, would be of public utility. At the last named term, *Joseph D. Sidener* remonstrated against the opening of the highway, alleging, in his remonstrance, that the same, if opened, will run through his land, will damage him 500 dollars, and will not be of public utility; and, therefore, he prays the appointment of reviewers. And thereupon the board appointed three reviewers, who, at the *September* term, 1860, reported that the contemplated highway, if established, will be of public utility, and that *Sidener*, by reason of its passage through his land, will sustain damage to the amount of 25 dollars. Upon the filing of this report, the board made an order, directing the proposed highway to be opened to the width of thirty feet, and be kept in repair as other highways—provided the petitioners herein shall pay *Sidener*, the remonstrant, 25 dollars, the damages assessed in his favor, &c. From this decision *Sidener* appealed.

In the Circuit Court, the cause having been referred to a jury, the parties, by agreement in writing, submitted, for the consideration of the jury, the following: "1. Would the proposed highway be of public utility? 2. If of public utility, would it be of any damage to *Sidener*; and, if so, what amount?" To these questions the jury responded, that "the proposed highway would be of public utility," and that *Sidener* would, if the road was opened, be damaged 25 dollars. The Court having refused a new trial, ordered that the sum of 25 dollars, found in favor of *Sidener* as damages, be paid out of the county treasury, and that the highway, as described

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in the petition, be opened and kept in repair as a public highway, &c.

The errors assigned are in substance as follows: 1. The Court erred in its refusal of evidence offered by defendant. 2. The verdict is unsustained by the evidence. 3. The width of the road is not specified in the order of the Court.

The plaintiff, upon the trial, offered to prove that the original petition was not signed by twelve freeholders, but the Court refused the offer, and he excepted. There is nothing in this exception. As we have seen, the only questions presented by the remonstrance, and submitted to the jury, related to the utility of the road and the question of damages. It follows the proposed evidence was not pertinent to the issues, and therefore inadmissible. *Kemp v. Smith*, 7 Ind. 471.

The plaintiff, on his own behalf, testified that the contemplated highway would run through his farm from east to west on the line between two sections, and through a lane which is closed up at each end; that the portion of his farm on the north side of the lane was fenced off into fields running north and south; that in the north-west corner of the farm there is a spring of unfailing water for stock, and that he had his fields so arranged that he could turn his stock from any field into the lane, from whence the stock could go to the water; that on the south side of the farm there is a small branch, but it is always dry during the dry seasons of the year, and he watered his stock on that part of the farm by turning them into the lane; that there was no stock water on the farm other than the above; and that he had arranged his farm in part for a stock farm, and dealt considerably in stock. Having thus testified, the plaintiff proposed to prove the difference between the market value of the farm, if any, as a stock farm in its present condition, and what it would be with the proposed highway running through it. The Court refused the evidence, but allowed "the plaintiff to prove the

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difference in the market value of the farm as it now is, and what it would be if the highway was opened."

We perceive nothing in these rulings, of which the plaintiff has a right to complain. The market value of the farm was its real value; and if, by reason of the location of the highway, that value would be diminished, the amount of such diminution is the true measure of damages. But the final order of the Court is plainly defective, because it fails to specify the width of the road. Of this, however, the appellant has no right to complain. The defectiveness of the order, in that respect, in no way conflicted with his rights; nor does it appear that such defect was pointed out to the lower Court. In looking into the whole record we perceive no error which authorizes a reversal. The judgment will therefore be affirmed, with directions to the Circuit Court to correct its order, by specifying the width of the road.

Per Curiam.—The judgment is affirmed accordingly, and remanded for the correction of said order, with costs.

Stansifer & Herod, for the appellant.

 DEPAUW v. THE CITY OF NEW ALBANY *et al.*

MUNICIPAL TAXATION—CITY OF NEW ALBANY.—Under the act of March 11, 1861, it is competent for cities, organized under the general municipal law of the State, to assess and collect taxes for the year 1861, upon stock in any of the free banks of the State, located in such cities, whether owned by persons residing in such cities or elsewhere.

TAXATION—CONSTITUTIONAL LAW.—The right of the State to impose taxes upon the citizen, and the duty of the latter to pay the same,

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161	474
22	204
170	491

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do not rest upon contract, but are limited only by the fundamental law of the State.

SAME.—A later law, embracing the subject of a former one, by implication repeals the former so far as they conflict with each other.

APPEAL from the *Floyd* Circuit Court.

HANNA, J.—It is averred, that from *January* 1st, 1861, hitherto, *DePauw* was the owner of 800 shares in the capital stock of the Bank of *Salem*, a free bank, located in *New Albany*, *Floyd* county, and that he was and is a resident of *Washington* county; that without authority of law, and wrongfully, the defendants caused said shares of stock to be assessed and placed upon the tax duplicate of said city, for municipal purposes, for the year 1861; that the treasurer threatens to levy and sell, &c. A demurrer was sustained to the complaint. The city was organized under the act of *March* 9, 1857. Acts 1857, p. 42. The city could not have levied this tax, in view of the circumstances, under that act; *City of Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connersville*, 15 *id.* 150.

The question is, whether, after the taking effect of the act of *March* 11, 1861, amendatory thereof, Acts 1861, p. 34, the right existed in the city to assess this property for that year. The latter act so amended the former, in view of said decisions of this Court, we suppose, as to authorize the taxation of the stocks of free banks, insurance companies, &c., doing business in such cities, whether the shareholder resides within the city or elsewhere. The act declared that an emergency existed, and that it should take effect from and after its passage. It was approved *March* 11, 1861. The twenty-first section, among other things, provides, in reference to the duties of the assessor, that he shall have the same powers, and be subject to the same provisions of the same law, as the assessor of real and personal property for State and county pur-

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poses." 1. G. & H. 221. It is urged, that, as this property was not, under the circumstances, taxable in the city of *New Albany* on the 1st of *January*, 1861, a law passed afterwards could not put that burden upon it for that year.

It appears to us that exacting taxes from the citizen by the governing power, and the obligation of the citizen to respond to such exaction, is not founded in contract. Upon what principle, then, would the citizen be exempt from responding to a demand at any given time for such taxes? The legislative power governs the question of the amount, and the manner in which the citizen shall contribute to the public demands, subject only to fundamental laws. It is apparent that it was the intention that the statute in question should operate in the current year; if not, why the necessity or use of the emergency clause in the act.

But, it is said, that by the laws in force up to the 11th of *March*, 1861, the assessment would be made to the appellant in the county where he lived, and if, after that, it could be made in the place where the branch was located, he would be thus doubly taxed. We do not perceive there is anything in this, for, in view of the constitutional provision as to taxation, we suppose the latest law, embracing, as it does in its terms, the subject of the former law, by implication repeals that law so far as there may be any antagonism.

Per Curiam.—The judgment is affirmed, with costs.

R. & H. Crawford, for the appellant.

Alexander Dowling, for the appellees.

Daniels et al. v. Barney; Same v. Wells.

DANIELS *et al* v. BARNEY; SAME v. WELLS.

CONTRACTS—BOND—EXPRESS COMPANIES.—An action can not be maintained against the principal and surety upon a bond given by an Express agent to secure the faithful discharge of his duties to an Express Company which carries on its business in the State of *Indiana*, without compliance with the requirements of the law of *March 5, 1855*, (1 G. & H. 327,) because, under the provisions of that law, the business of such company, so carried on is illegal. The parties to such bond are bound to know the law, and must be presumed to know that the requirements of the law have not been complied with by the company which were necessary to render the business legal.

CONTRACT—PRINCIPAL AND AGENT.—It seems that, if money due to a principal on an illegal transaction be paid to his agent for him by the party from whom it is due, the principal may recover it from the agent; for the contract or obligation to pay the money to his principal is not connected immediately with the illegal transaction, but grows out of the receipt of the money by the agent for the use of his principal.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—In 1855, the legislature of *Indiana* enacted:

That all persons, associations of persons, or companies, usually called Express Companies, regularly engaged, or hereafter to be engaged in the business of carrying or transporting packages or parcels of bank notes, coin, merchandise, or other articles, over or upon any of the railroads, rivers, canals, or other thoroughfares in this State, and receiving, or agreeing to receive, compensation for such services, shall be, and they are hereby declared common carriers, and shall be subject to all the liabilities to which common carriers are subject according to law.

SEC. 2. Such persons, associations, or companies, shall file in the office of the recorder of each county in which their business is conducted, or where they may have an agency or

22	207
145	511
22	207
152	21

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office, a statement showing the full name of every such person and member of every such association or company, and also his or her proper place of residence, and the amount of capital employed in such business; and also an agreement that legal process served upon any agent of said person or persons, association, or company, in such county, shall be deemed and taken as good service upon such person or persons, association, or company; and it shall be the duty of the recorder to make a record of the same, and also to publish in a newspaper of the county, if there be a newspaper, or otherwise to post up in three of the most public places in the county along the proper route or line, a full and complete copy of such statement and agreement, which shall be duly certified by said recorder. Such statement shall be signed by the persons and members of such associations or companies, and shall be verified by oath or affirmation before the same is admitted to record. The recorder shall be entitled to receive and demand from the person or persons, association, or company, for the service herein required, the sum of 5 dollars. Until such notice be given it shall not be lawful for any person, association, or company, to transact the business named in the first section of this act in such county; and any person, member of any association, or company, or any agent thereof, violating the provisions herein contained, shall for every such offence, be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than 10 nor more than 100 dollars, in the name of the treasurer of the county: *Provided*, That nothing contained in this section shall be construed to affect the rights or privileges of persons, citizens of this State, engaged in the ordinary transportation of merchandise, produce, or other articles, in wagons or other conveyances.

SEC. 3. Railroad companies and the owners and masters of steamboats, canal boats, and other vessels, shall not be

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exempted from the liabilities of common carriers, by the operations of this act, but may be proceeded against, at the option of the claimant, in case of any loss or damage, where the railroad, steamboat, canal boat, or other vessel shall have been employed in the conveyance of the messenger, or other agent of the person or persons, associations, or companies, named in the first section of this act. 1 G. & H. 327.

In 1860, the *United States Express Company* appointed *Henry W. Daniels*, of *Indianapolis*, agent for said company at that city, and took from him a bond in the penal sum of 2500 dollars, with *Samuel P. Daniels* and *Joshua M. W. Langsdale*, as his sureties, which bond was conditioned thus:

"Whereas the said *Henry W. Daniels* has been appointed agent by and for the said Express company at *Indianapolis* aforesaid; now, therefore, the condition of this obligation is such that if the said *H. W. Daniels* shall well and faithfully do and discharge the services, duties, and obligations as such Express agent, and in such manner that no loss or damage shall accrue directly or indirectly to said company by or in consequence of any act or acts, omission or omissions, failure or laches, unfaithfulness or dishonesty of said *H. W. Daniels* in or pertaining to the business of said Express company, then this obligation to be void," &c.

Daniels failed to pay over money received for the transportation of packages, &c., and the Express company sued him and his sureties on his bond, to recover the same. To this suit the defendants answer thus:

"The defendants answer and say that at the time of the execution of said supposed bond, and ever since, the *United States Express Company*, for whose sole use this suit is brought, was an association of persons usually called an Express company, and were then, and ever since have been, engaged in the business of carrying and transporting packages, parcels of bank notes, coin, merchandise, and other arti-

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cles over and upon the railroads, rivers, and other thoroughfares in this State and other States of the Union, and receiving and agreeing to receive compensation for such services; and that the employment of said *Henry W. Daniels*, and his appointment as agent for said *U. S. Express Company* mentioned in said supposed bond, was by said supposed bond intended to be, and in fact was, to serve the said Express company in the business aforesaid, to wit: in the county of *Marion*, in the State of *Indiana*. And the defendants say that all the moneys mentioned in the complaint, as having been received by said *Henry W. Daniels*, were received by him in the course of his said employment and agency in the business aforesaid in said county.

“And the defendants further say that the said business so carried on by said company, and so conducted and prosecuted by said company through said agency and employment of said *Henry W. Daniels*, was and is wholly unlawful in this, to-wit: that at no time before the execution of said supposed bond, nor at any time since, and while said *Henry W. Daniels* was engaged in the employment and agency aforesaid, did said Express company file with the recorder of said county, in which said agency was carried on and in which said company had an office all the time aforesaid, a statement showing the full name of every member of said association and company, and the proper place of residence of each such member, and the amount of capital employed in said business, and also an agreement that legal process served on any agent of said Express company and association, in said county, should be deemed and taken as good service upon said association and company; all which they wholly omitted to do in manner and form aforesaid, contrary to the form of the statute in such case made and provided; of all which the defendants were ignorant till the time of the commencement of this suit.”

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The following was the reply :

"The plaintiff, for reply to the answer of the defendants, says that the bond mentioned in the complaint was given as a guaranty to the plaintiff, among other things, that the defendant, *Henry W.*, would faithfully account to the plaintiff for all moneys that should come into his hands for the use of the plaintiff in the course of his employment in said business.

"And the plaintiff further says that the several sums of money alleged in the complaint to have been received by said *Henry W. Daniels* for the use of the plaintiff, were received by him in the course of his employment for the use of the plaintiff, from those persons for whom the plaintiff had carried packages of goods, merchandise, parcels of bank notes, coin, and other articles of value, as a common carrier; and that he has failed to account for the same as alleged in the complaint."

A demurrer to this reply was overruled and the plaintiff had judgment.

The bond sued on was not taken, so far as appears, pursuant to any statute; but bonds of indemnity for the performance of legal acts may be good at common law. See *Byres v. The State*, 20 Ind. p. 49.

Was the bond in question one of that character? If, by the contract of agency between the Express company and *Daniels*, he was to perform for the company only legal acts, the bond to secure the faithful performance of such acts was a legal one.

If, on the contrary, the contract of agency between the parties mentioned was for the performance of illegal acts; as if it was agreed between them, at the making of the contract, that they would carry on the express business without complying with the statute, set out in the opinion, and the bond was executed upon that contract, the bond was void in its

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inception. Says *Story*, in his work on Agency, section 195: "Nay, the principle is carried further; and if the main object for which the agent is employed is legal, yet if, by the terms of the contract, and as a part of it, the agent is to act in an illegal character or manner in another part of the transaction, the whole contract will be contaminated thereby, and the agent can recover no compensation even for his legal acts under the contract. Neither can the principal enforce any of its obligations." It is not necessary that we should extend the consequences of illegality, in this case, so far as the extract from *Mr. Story* carries it.

If there was no such agreement as above described, but the bond was given upon a contract of agency in the performance of legal acts only, then the company had no right to require the agent to perform illegal acts, and the bond would not extend to anything connected with such acts, because they were not covered by the bond. See *Story* on Agency, § 344, *et seq.*

The reply of the plaintiff in the case, taken in connection with the answer, shows, with reasonable certainty, that all the money received by the agent, *Daniels*, was received as compensation for the performance by him, for the Express company, of illegal acts, viz: the transportation of packages, &c.

And the plaintiff, to support a right to recovery, falls back upon this proposition of law, viz: that "if money due to a principal on an illegal transaction should be paid over to his agent for him by the party from whom it is due, it has been held that the principal may recover it from the agent; for the contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction; but it grows out of the receipt of the money for the use of his principal." 5th ed., *Story* on Agency, § 347; See, also, *Chit. on Cont.*, 9th ed., p. 620; *Dunlap's Paley* on Ag., p. 62;

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Add. on Cont., p. 648; 11 Wheat. 258; 11 How. 493; 16 M. & W. 185; 39 Barb. 140; 10 Ind. 109; 4 *id.* 8; 12 *id.* 199.

This proposition of law we admit, at least, in cases where the agent has not been concerned, by the order of the principal, in the execution of the illegal transaction, so far as it applies to the agent himself. It may be that if this suit had been brought against the agent himself, upon an implied assumpsit to pay over money received to the use of his principal, it would have rested upon a principle free from doubt. But this is not such a suit. This is a suit upon the bond of the agent, and against his sureties therein; and the question is, what acts of the agent are covered by that bond? If it was executed to cover illegal as well as legal acts, the bond was void *ab initio*. Story on Agency, § 195; Chit. on Cont., 7th Am. ed., 677 *et seq.*, and notes; *Anderson v. Farris*, 7 Blackf. 343. The bond, by its terms, embraced all acts in the scope of the Express business; and it would seem that all parties were bound to know the law, and that the notice required by statute to render the business legal had not been given at the execution of the bond; and if it was then understood by the parties that the notice was not to be given, and the business prosecuted without, the bond was illegal, as we have said, in its execution. But, on the other hand, if the bond was executed to cover only legally conducted business transactions, then, the illegal acts participated in by the agent, by the direction of the principal, through which the money in question came to the hands of the agent, were not covered by the bond, and the principal has nothing to look to but the individual liability of the agent. These transactions could not be covered by the bond in parts, and not in parts. They were under the bonds as entireties or not at all. We think there can be no doubt about this. In any view of the case, therefore, we think no suit can be maintained on the bond in

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question. See *Dedham Bank v. Chickering*, 4 Pick. (Mass.) Rep. 314.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

McDonald & Porter, and *McDonald & Roache*, for the appellants.¹

L. Barbour and *J. D. Howland*, for the appellees.²

(1) Counsel for the appellants argue:

In 1855, before the execution of the bonds upon which these suits were brought, the legislature passed an act, yet in force, concerning Express companies, which provides that all persons, associations of persons, or companies, usually called Express companies, regularly engaged, or thereafter to be engaged in the business of carrying or transporting packages or parcels of bank notes, coin, merchandise, or other articles, over or upon any of the railroads, &c., in this State, and receiving or agreeing to receive compensation for such services, shall be and are thereby declared common carriers, &c., and shall file in the recorder's office of each county in which their business is conducted, or where they have an agency or office, a statement showing the full name of every such person and member of every such association or company, and also his or her proper place of residence, and the amount of capital employed in such business; also an agreement that legal process served upon any agent of said person or persons, association, or company, in such county shall be deemed and taken as good service upon such person or persons, association, or company; and it shall be the duty of the recorder to make a record of the same, and also to publish, &c., a full and complete copy; that the statement shall be signed by the persons and members of such associations or companies, and verified by oath, &c.; that until such notice shall be given it "*shall not be lawful*" for any such person, association, or company, to "*transact the business*" above named; and any person, member of any association, or company, or "*any agent thereof*," violating the provisions of the act, shall, for every such offence, be guilty of misdemeanor, and upon conviction shall be fined not less than 10 nor more than 100 dollars. 1 Gav. & Hord's Stats., 327.

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It will be observed that besides the denunciation of a penalty against the company for doing business before the filing and publication of the statement required by the statute, the statute expressly makes the transaction of the business itself unlawful.

In this case the Express company were transacting business in direct violation and in defiance of the statute. They had employed the defendant *Daniels* to assist them in doing what the law had forbidden. Their business was to transport merchandise, &c., for hire; but they had no right to transport the merchandise, or receive the hire, until they had filed and published the statement required by law. Either was alike unlawful. His duties to secure performance of which the bond was given, were strictly limited to those of an Express agent—he had none beside. No part of these duties could be lawfully performed by him. To employ him was to increase the capacity of the company to do what the law had forbidden; the exaction of a bond with surety was not only designed to quicken his diligence in doing this, but also more certainly to secure the company the rewards of an illegal undertaking. If it was unlawful for the company to receive hire, and *Daniels* received it as their agent, then the parties being *in pari delicto*, *potior est conditio defendentis*. Nor can the circumstance that he gave a bond make any difference. *Collins v. Blantern*, 2 Wils. 341.

The rule which governs this case is a familiar one. "Where a contract or deed is made for an illegal purpose, a defendant against whom it is sought to be enforced may show the turpitude of both himself and the plaintiff, and a court of justice will decline its aid to enforce a contract thus wrongfully entered into. An unlawful agreement, it has been said, can convey no rights in any Court to either party; and will not be enforced at law or equity in favor of one against the other of two persons equally culpable." *Broom's Legal Max.* 578 (marginal paging.)

The rule is illustrated in the memorable words of Lord *Mansfield* in *Holman v. Johnson*, Cowp. 343. "The objection," says he, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded

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in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say. * * * No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of his country, there the Court says he has no right to be assisted. It is upon that ground that the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*."

To apply this reasoning of Lord *Mansfield* to the cases at bar, suppose *Henry W. Daniels* had sued the plaintiff on these bonds for his services, or had sued on a *quantum meruit* for said services, could there be a doubt that the illegality of the contract and services would have defeated his action?

In 1 Parsons on Cont. 382, the author remarks: "Where the consideration is altogether illegal, it is insufficient to sustain a promise, and the agreement is wholly void. This is so equally, whether the law which is violated be statute law or common law. It has been held in England that where a statute provided a penalty for an act, without prohibiting the act in express terms, there the penalty was the only legal consequence of a violation of the law, and a contract which implied or required such violation was nevertheless valid. But Lord *Holt* denied the doctrine, and Sir *James Mansfield* established a better rule of law, holding that where a statute provides a penalty for an act, this is a prohibition of the act. We apprehend that this has always been the prevailing if not the uncontradicted law in this country." A multitude of cases is cited, fully supporting the text. Lord *Holt* in the case of *Bartlett v. Vinor*, Skin. 322, says: "Every contract made for or about any matter or thing which is prohibited or made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there

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are no prohibitory words in the statute." In the case at bar, however, as we have heretofore shown, not only are the transactions declared penal, but expressly unlawful.

The case of *The State v. The State Bank*, 5 Ind. 353, is much in point. An act of the legislature had provided that the school commissioner should, on taking a mortgage, loan to the applicant any sum not exceeding half the appraised value of the land; but a greater amount than 300 dollars should not be on loan to any one applicant at a time. A mortgage given to secure a loan of more than 300 dollars to a single applicant was held to be void, as being an illegal contract in contravention of the statute. And the words of Lord Mansfield above quoted are cited by the Court with approbation. The words of that statute are certainly not sterner than those which prohibit Express companies from transacting business prior to a compliance with its provisions.

Several cases were cited by counsel for the plaintiff to support the validity of the bond; but it is believed that a thoughtful reading will show them to be in our favor. We will proceed to discuss them.

The first is *Randon v. Toby*, 11 How. (U. S.) 493. In a suit upon notes, there was a plea that the notes were given for African negroes imported into Texas after 1833; and the argument in support of it was that the notes were void, because the introduction of African negroes both into Cuba and Texas, was contrary to law. "But," the Supreme Court say, "in neither point of view will these facts constitute a defence in the present case. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void and the Court would give no remedy to the offending party, though both were *in pari delicto*. But Toby (the payee) or his agent McKinney had no connection with the person who introduced the negroes contrary to law. Neither of the parties in this case had anything to do with the original contract, nor was their contract made in defiance of law. The buying and selling of negroes in a State where slavery is tolerated, and where color is *prima facie* evidence that such is the status of the person, can not be said to be an illegal contract and void on that account." Here, then, the parties were both strangers to the illegal transaction connected with the negroes;

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they had had nothing whatever to do with it. But, in the case at bar, both the plaintiff and the defendant, *Henry W. Daniels*, were parties to an illegal transaction, the one as employer and the other as employee, and the bond is directly connected with it.

The next case cited below by the plaintiff's counsel is *Armstrong v. Toler*, 11 Wheat. 258. The questions in the case arose upon instructions given by the Circuit Court, touching contracts founded upon an illegal consideration. The Court sustained instructions to the following effect: "That where the contract grows immediately out of an illegal act, a court of justice will not enforce it; but if the promise be unconnected with the illegal act and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made and although he was the contriver and conductor of the illegal act. Thus if *A* should, during war, contrive a plan for importing goods from the country of the enemy on his own account, by means of smuggling or of a collusive capture, and goods should be sent in the same vessel for *B*, and *A* should upon the request of *B* become surety for the payment of the duties, or should undertake to become answerable for the expenses on account of a prosecution for illegal importation, or should advance money to *B* to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract upon a valid and legal consideration, unconnected with the original act, although remotely caused by it, and such a contract would not be so contaminated by the turpitude of the offensive act as to turn *A* out of Court when seeking to enforce it; although the illegal introduction of the goods into the country was the consequence of the scheme projected by *A* in relation to his own goods." The reasoning of the Supreme Court in favor of the instruction is this: "The case does not suppose *A* to be concerned, or in any manner instrumental in promoting the illegal importation of *B*." He was a stranger to *B*'s illegal act. To pay the duties was legal, and as *A* was not connected with *B*'s transaction except in becoming *B*'s surety, after the arrival of the goods, for the payment of the duties, and in afterwards paying them, his right to recover from *B* the amount so paid was clear. And the Supreme Court further add, in justification of the charge, that "it is laid down

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with great clearness that, if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them for the owner, a bond or promise given to repay any advances made in pursuance of such understanding or agreement would be utterly void.' The Court, then, criticising the argument for the plaintiff in error, add that, "in most of the cases cited by the counsel for him, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it," referring to the cases, and they add in approval of them, that "in these and all similar cases, the consideration of the very contract on which the suit is brought is vicious and the plaintiff has contributed to the illegal transaction." The argument is altogether in our favor. The Express company is a party to "the original transaction" of transporting merchandise and receiving hire therefor, without complying with the statute, and the bond of *Daniels*, obliging him to aid in this unlawful business, is so "connected with the original transaction as to be inseparable from it."

The next and last case cited by the plaintiff's counsel is the *Dedham Bank v. Chickering and Others*, 4 Pick. 314. The facts, so far as applicable to the present case, were as follows: *Chickering* had been cashier of the *Dedham Bank*, and before entering upon his office had given a bond, with the other defendants as sureties, for the faithful performance of his official duties, &c. The bank, prior to 1816, had authority to issue circulating bills payable at other places than its counter, but in 1816 the legislature had enacted that no bank should issue bills payable at any other place than the bank, unless the bills should also on their face be payable at the bank; that every bank which should issue any such bills should be liable to pay the same at the bank, without a previous demand elsewhere; and that if the bank should refuse to pay the same on demand, it should be liable to pay the holder after the rate of 2 per cent. a month as additional damages. Bills of the *Dedham Bank* to the amount of 24,476 dollars, payable at the *Middletown Bank*, had been issued, and having been redeemed by the latter bank, had been transmitted and delivered

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by it to *Chickering* as cashier, for the whole of which amount, by the direction of *Chickering*, he had credited on the books of the *Dedham Bank*. But *Chickering*, in fact, only returned to the *Dedham Bank* 15,000 dollars of the bills thus transmitted to him, and surreptitiously reissued, for his own benefit, the remaining 12,746 dollars, for which amount judgment was sought against the defendants. The defendants set up, by way of defence that the delinquency of *Chickering* grew out of an illicit transaction on the part of the directors and cashier of the *Dedham Bank*, the issuing and circulating of bills of this description being expressly prohibited by the statute already cited. In delivering the opinion of the Court, the judge, at the outset, says, that it ought to have been made to appear that the bills thus embezzled were issued after the passage of the statute, it not having been before unlawful for a bank to issue bills payable at any other place than their own bank; and that it was not for the Court, without evidence, to say that the bills were not issued before *December 13, 1816*, which was the day of the enactment of the statute. This statement alone disposed of the case, and the Court's subsequent remarks might properly be regarded *obiter dicta*. But not choosing to rest the decision solely on that ground, it put it also upon another ground, viz: that though it was unlawful to issue such bills after the passage of the statute, yet the bills were not made void thereby, but, on the contrary, had a force expressly given to them beyond their mere terms. Though not by their face, yet by the terms of the statute, they were made payable at the place whence they issued, and a refusal to pay on demand entitled the holder to four times the usual amount of interest. When taken up at the bank at *Middletown* by the funds of the *Dedham Bank*, they became the property of the latter. "It was not unlawful," therefore, say the Court, "to receive them back into the bank after they had been in circulation." "It was the proper duty of the cashier so to receive them, and having received them, if he reissued them without the knowledge of the directors, or in any way converted them to his own use, he committed a breach of trust." "We think," adds the judge, "this transaction wholly disconnected from the illegality of the issuing the bills, and that such illegality affords no manner of excuse to *Chickering* for purloining them, or of defence

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to his sureties. Had the charge been that he had neglected his duty in issuing these bills, * * the illegality of the intention to issue might have been a defence."

This Court will observe that *Chickering* was not connected by the evidence with the original transaction of issuing these bills; that, by the statute, they were not void; that when redeemed the bank had a right to their return for cancellation; that the cashier having received them after redemption, it was his duty to return them, and that not returning them, and reissuing them, was a breach of duty.

But, in the case at bar, the plaintiff and *Henry W. Daniels* were both connected with the original unlawful transaction, and, moreover, it being unlawful to receive hire for transportation, it could not be the legal duty of *Daniels*, having received it, to pay it over. *Potior est conditio possidentis*.

We understand that the appellee further relies on the case of *Murray v. Vanderbilt*, not yet published, but a note of which appears in *The American Law Register* for *October*, 1863, pp. 765, 766. This very brief statement of the case is unsatisfactory; it embodies few of the facts and none of the reasoning of the Court. It shows enough, however, to render that case clearly distinguishable from the case at bar. It is evidently distinguishable in two important particulars:

1. In that case, the illegality of the original contract, if any, was not by a prohibitory statute forbidding the contract and making it penal, but by a rule of public policy. On this we do not, indeed, very much rely. We mention it, however, as worthy of consideration.

2. In the case of *Murray v. Vanderbilt*, the action was not on any original contract to do an unlawful act, but against an agent who had received money for the plaintiff which had been paid to him voluntarily by one of the parties to the original unlawful contract. The note of the case states that it was "*Held*, that in action brought by the *Transit Co.* against the *Pacific Co.* (the parties to the unlawful contract) * * * the Court would not enforce it against the delinquent party." The case seems to have been simply this: By an illegal contract, *A* agreed to pay *B* a sum of money. The agent of *B*,

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who had no connection with the illegal contract, received this money for *B* from *A*, who voluntarily paid it. The agent refused to pay it to his principal, *B*. And the Court held that the agent, in a suit against him by *B*, could not defend on the ground of the illegal contract between *A* and *B*. This was, perhaps, right; but right or wrong, it evidently is wholly unlike the case at bar.

In the case of *Murray v. Vanderbilt*, and in all the cases cited by the appellees, there is this broad, plain distinction, as compared with the present action: All those cases were, to say the most, but collateral to, or remotely connected with, the original illegal contract; but here the action is plainly an action upon the original unlawful agreement. If the suit had been upon an implied assumpsit against the principal, *Henry W. Daniels*, alone, to recover the money he had received as the agent of the plaintiff, there might have been some analogy between such a case, and those cases cited by the appellee. But here the suit is upon the original illegal contract—the bond, and it alone—by which the appellants engaged to do an illegal act. The whole consideration of this bond, on which they are sued, is utterly unlawful. And we confidently assert that no respectable modern authority can be found which will justify a recovery on such a bond.

And the objection to such a recovery is, if possible, still stronger, when we consider that the action is against two sureties, who must pay the money if the suit be sustained, and especially when we consider that the answer shows, and the fact is admitted by the reply, that the appellants “were ignorant till the time of the commencement of this suit,” of the facts rendering said bond illegal.

And here we would remark that, though we have thus far argued this case as if the parties to the bond were all *in pari delicto*, yet the admitted allegation in the answer that the appellants were “ignorant” of the facts rendering the bond illegal, shows that they were not *in pari delicto* with the appellant, but wholly innocent. And, as the appellant, the president of the Express companies, must be presumed to have known the facts of which the appellants were thus ignorant, he alone was *in delicto*. And in this view of the case, we submit that the contract is not only void for illegality, but is also invalid because of a fraud perpetrated by him on them in seducing them into

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a contract which it must be presumed they would not have made, if they had been aware that it was illegal. For every man is presumed to keep the law till the contrary is shown.

(2) Counsel for the appellees argue:

Waiving other considerations that were urged in the Circuit Court, we propose to show the law to be that an agent to whom money is paid on behalf of his principal, can not refuse to account to his principal on the ground that it accrued upon an illegal contract. We hope to place this proposition beyond doubt, by a pretty full citation of the authorities.

Chitty on Contracts, 9th ed., p. 620: "A principal who has lodged money in his agent's hands for an illegal purpose, may, before the money is so applied, countermand the agent's authority, and recover it back as for money had and received to his use. It seems that an agent who receives money for his principal, can not resist an action by the latter for the amount as received to his use, on the ground that the money was paid to the agent by a third party under an illegal contract between the latter and the plaintiff."

No elementary writer employs stronger language than does Judge Story, against illegal contracts. Yet he is compelled to concede the law to be, that "if money due to a principal on an illegal transaction should be paid over to his agent for him by the party from whom it is due, it has been held that the principal may recover it from the agent; for the contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction; but it grows out of the receipt of the money for the use of his principal." 5th ed. Story on Agency, § 347.

Dunlap's Paley on Agency, 62, is equally explicit: "If money have been actually paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands. For though the law would not have assisted the principal, by enforcing the recovery of it from the party by whom it was paid, because it is not the policy of the law to aid the completion of an illegal contract, yet when that contract is at an end, the agent, whose liability arises solely from the fact of having received money to another's use, can

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have no pretence to retain it. This doctrine was recognized by the Court of Common Pleas in a case where a broker, having effected an insurance upon a ship engaged in a trade to the *East Indies*, contrary to the 7th Geo. I, and having received the loss from the underwriters, refused to pay it over to his employer, alleging the illegality of the transaction as a defence to the action for money had and received to his use. The plaintiff, however, had a verdict; and the Court, upon a motion for a new trial, thought the verdict right. And in a subsequent case, where the defendants had received money for the plaintiff, *as the price of counterfeit coin*, which they had been employed to carry and procure payment for from the parties who purchased it, it was held that the illegality of the transaction furnished no defence to them, in an action for money had and received. And, in both these cases, the Court considered the original transaction as forming no part of the implied contract arising from the receipt of the money, which formed the ground of the action."

The same author, at page 10, declares it is an established principle that an agent can not make himself an adverse party to his principal; and in note *k*, to the same page, it is said: "In general an agent can not deny the title of his principal to the subject matter of the agency, or protect himself in a suit by the principal by setting up an adverse title in a third person."

Addison on Contracts, 648: "The Courts will not try the right of the principal to the money in an action against the agent."

Indeed it would be difficult to state the law more clearly in accordance with these principles than has been done by Judge *McDonald*, the counsel who is now arguing against us. "It is only when the contract grows immediately out of, and is connected with an illegal or immoral act, that a Court of justice will lend its aid to enforce it. But if the promise is unconnected with the illegal act, and is founded on a new consideration, it is binding, although the plaintiff knew, and was the contriver and conductor of the illegal act. Thus if you are indebted to *J S* on a contract forbidden and unlawful, and you pay the money to *C*, for the use of *J S*, and *C* refuse, contrary to his implied contract, to pay the money to *J S*, the law will make him do it. In this case *J S* could not have recovered against you; but when the

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money came to *C* a new promise was raised. Besides, the law will not permit a third person, who is only incidentally connected with the transaction, to set up illegality in the contract between the principal parties, and thus commit a fraud." McDonald's Treatise, 385.

Notwithstanding the criticisms of counsel, we insist that the case of *Armstrong v. Toler*, 11 Wheat. 258, is directly in point. This is shown by the fact that in it are discussed all the leading cases involving the principle we have to examine. We submit some extracts from the opinion of Chief Justice *Marshall*:

"Questions upon illegal contracts have arisen often, both in *England* and in this country; and no principle is better settled than that no action can be maintained upon a contract, the consideration of which is either wicked in itself, or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made. In *Falkney v. Reynous*, 4 Burr. 2069, the plaintiff and one *Richardson* were jointly concerned in certain contracts prohibited by law, on which a loss was sustained. the whole of which was paid by the plaintiff; and a bond was given for the securing the repayment of *Richardson's* proportion of the loss. To a suit on this bond the defendant pleaded the statute prohibiting the original transaction, but the Court held on demurrer that the plaintiff was entitled to recover. Although this was a case upon a bond, the judgment does not appear to have turned on that circumstance. Lord *Mansfield* gave his opinion on the general ground that if one person apply to another to pay his debt, (whether contracted on the score of usury or for any other purpose,) he is entitled to recover it back again. This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in an unlawful transaction, may be sustained in a Court of justice. In a subsequent case (6 Term Rep. 410,) *Ashhurst J.* said the defendants were held liable because they had voluntarily given another security."

"In the case of *Petrie v. Hannay*, 3 Term Rep. 418, the testator of the plaintiffs was engaged with the defendant in stock transactions

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which were forbidden by law, on which considerable losses had been sustained, which were paid by *Portis*, their broker. *Keeble* repaid the broker the whole sum advanced by him, except £84, which was in part the defendant's share of the loss, for which *Keeble* drew a bill on the defendant, which was accepted. The bill not being paid, a suit was brought upon it by *Portis* against the executors of *Keeble*, and judgment obtained, they not setting up the illegal consideration. The executors brought this action to recover the money they had paid, and it was held by three judges against one, on the authority of *Faikeney v. Reynous*, that the plaintiffs could maintain their action. A distinction was taken in cases where money was paid by one person for another, on an illegal transaction, by which the parties were not bound; between a voluntary payment and one made on the request of a party; between an assumpsit raised by operation of law, and an express assumpsit. Although the former would not support an action, the latter would."

"This, also, is a strong case to show that a new contract, by which money is advanced at the request of another, or which is the same thing, where there is an express promise to pay, may sustain an action, although the money was advanced to satisfy an illegal claim." "In *Farmer v. Russel*, 1 Bos. & Pul. 296, it was held that if *A* is indebted to *B* on a contract forbidden by law, and pays the money to *C* for the use of *B*, a Court will give judgment in favor of *B* against *C* for this money. In this case *B* could not have recovered against *A*; but when the money came into the hands of *C* a new promise was raised on a new consideration, which was not infected by the vice of the original contract. In this case Chief Justice *Eyre* said that the plaintiff's demand arose simply from the circumstance that the money was put into *C*'s hands for his use; and Justice *Buller* said that the action did not arise upon the ground of the illegal contract. Yet, in this case, *A*'s original title to the money was founded on an unlawful contract, and he could not have maintained an action against *B*."

"The general proposition stated by Lord *Mansfield*, in *Faikeney v. Reynous*, that if a person pay the debt of another at his request an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before

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the Court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case. A subsequent express promise is undoubtedly equivalent to a previous request.

In *Randon v. Toby*, 11 Howard 493, this language is used by Justice Grier:

"If the defendant should be sued for his tailor's bill, and come into Court with the clothes on his back, and plead that he was not bound to pay for them because the importer had smuggled the cloth, he would present a case of equal merits, and parallel with the present; but would not be likely to have the verdict of the jury or the judgment of the Court in his favor."

Cummings v. Henry, 10 Ind. 109, decides that a contract for the sale of property for gaming, or, indeed, to be used in any way in violation of statute, is not void; and that the vendor, although knowing the intended use of the property, may recover its value. The case of *Toler v. Armstrong*, above referred to, is cited with approval.

We call special attention to the case of *Bousfield v. Wilson*, 16 Meeson & Welsby, 185. These are Exchequer reports, and of the highest rank and value of any modern *English* reports. The defendant, as agent of the plaintiff, had sold fifteen shares of stock in a railway company, which had not been registered in accordance with an act of Parliament. The suit was brought by the principal to recover of his agent the money received on the sale of these shares of stock. The defence was that the sale was in violation of the act of Parliament, and that no recovery could be had. The Court absolutely ridiculed the defence.

The case of the *Dedham Bank v. Chickering*, 4 Pick. 314, is one upon which we may very well rely. The Bank issued its bills payable at a distant point, and, if they had been issued after the passage of a certain act of the Legislature of *Massachusetts*, the issue was illegal. The Court speak of the case in this aspect. They consider what the rule is, supposing the bills to have been originally circulated in fraud of the statute. The cashier, who certainly was the agent of the bank in its financial operations, and must have signed these unlawful bills, and so have participated in the unlawful act, was

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the depository who received them into his custody. The receiving them was not unlawful, say the Court: "It was the proper duty of the cashier so to receive them; and having received them, if he re-issued them, without the knowledge of the Directors, or in any way converted them to his own use, he committed a breach of official trust. On these bills, however unlawfully issued, the bank was liable, and without doubt has since been compelled to redeem them. We think this transaction wholly disconnected from the illegality of issuing the bills, and that such illegality affords no manner of excuse to *Chickering* for purloining them, or of defence to his sureties. Had the charge against *Chickering* been that he had neglected his duty in issuing these bills, or that he had destroyed them because intended to be issued contrary to law, the illegality of the intention to issue might have been a defence. But he is charged with having received them, after they had been in circulation, and been collected in *Middletown* to be returned to the bank by which they were issued, and, instead of placing them in the vaults, from whence it can not appear they would ever have been again issued, putting them in circulation himself, or otherwise converting them to his own use. There seems to be nothing illegal in the transaction, so far as we can see into it, except in the conduct of *Chickering*." *Id.* 336, *et seq.*

But, say counsel, it does not appear that *Chickering* was connected with the original illegal act—the issuing of these bills; and so they would distinguish that case from this. *Chickering* was the cashier, the active business agent of the bank, signing its bills, and by the very character and functions of his office, superintending the circulation of its paper. If the logic of counsel is applied to the bank and its cashier, as they apply it to the Express company and its agent, it is plain that the doctrine of *par delictum* comes home to the former as completely as it does to the latter. An unlawful act was committed by the officers of the bank, of whom the cashier was one; he participated in that offence: that act was remotely the means of putting these bills into his hand, and enabling him to purloin and circulate them. But the Court was unable to see that because there had once been a joint illegal act participated in by the bank and its agent, it

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gave the latter a perpetual right to steal from the principal the fruits of their original sin.

The case of *Murray v. Vanderbilt* will be at the command of the Court, in 39 Barbour, N. Y. R., before this case is examined by them. The statement in the American Law Register is as follows :

"An agreement was made between the Pacific Mail Steamship Company and the Accessory Transit Company, by which the former company was to pay the latter a certain sum per trip, or per month, so long as the boats of the Pacific company should run without opposition. *Held*, that in an action brought by the Transit company against the Pacific company, although the contract was immoral and in restraint of trade and commerce, and the Court could not enforce it against the delinquent party, or, if the money had been paid, enable the party paying to recover it back, but would leave the parties where the law found them, both being in *pari delicto*, yet that the rule did not apply to an action by one of the principals in such a contract against the agent who had received the money thereon."

"Money being paid voluntarily to an agent, for his principal, by a party who could not be compelled to make such payment, it becomes the property of the principal in his agent's hands, for which he should account. He has no right to refuse payment to his principal because the latter had not a legal right to the money paid."

"An agent has no right to dispute the title of his principal to moneys received by him for the use of his principal. Nor can he resist an action for the amount so received, on the ground that the money was paid on an illegal contract between the original parties."

The observations of counsel upon these cases, in their effort to distinguish them from the one in hand, are ingenious but unsound. The doctrine of *par delictum* is applied to the principal parties in the contract. To either of them, on his obtaining any advantage over the other, the Court say: "You are both guilty, and we do not aid either; *melior est conditio possidentis*." But where is the authority by which it can be shown that an agent of such a contracting party has been shielded in this way? The counsel have found none. It is safe to assert that no such authority exists. The agent of one engaged in an unlawful business is himself necessarily engaged in an

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unlawful business. The agent who signs and circulates illegal bank notes is as guilty as the president and directors of the bank. The agent whose duty it is, as in the case of the steamship companies, to receive for his principal the money paid to defeat competition, is quite as guilty of violating the law as the principal himself. The agent who carries counterfeit coin and receives the pay for it, is as guilty as the principal who entrusted him with it. In short, these cases, and the rules deduced from them by the elementary writers, proceed upon the notion that the agent of a person engaged in an illegal traffic is his agent in that very business. Where do you find the distinction made that gentlemen assert here? It would thus in substance appear in the books: "The general rule is that an agent can not refuse to pay over to his principal money received by him, on the ground that it was paid on an illegal contract; but this rule is to be understood with this qualification, that the agent is to be one who acts in some capacity for his principal wholly disconnected with the illegal contract. If the agent is involved in the guilt of his principal he may keep the money, for the reason that he is in *pari delicto* with him, and may insist on the consequence of that relation—*melior est conditio possidentis*." But there is no such qualification anywhere made to the liability of an agent to account to his principal.

The law proceeds on another ground. Money in the hands of an agent is the money of his principal. The agent is in law estopped to deny his principal's title; just as a tenant is estopped to deny that of his landlord. Have we ever heard that a tenant who had aided his landlord in some illegal act by which the title to the land had been acquired, could hold the possession against his landlord? The law is founded upon a purer morality than this. It is of highest concern that these relations of confidence shall not be violated. The law will have a certain degree of "honor among thieves." It will not allow the agent to steal from his principal because his principal stole from another; nor does it any the more protect the defaulting agent because he has the shamelessness to say that he helped to commit the theft of which he accuses his master.

It is urged, however, that the bond sued on was an illegal contract, within the prohibition of the statute, and that the suit must fall, on

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the ground that the agent can not be required to respond to his principal, if the recovery can only be had through the medium of an illegal contract.

The act of 1855, in the latter clause of section 2, declares: "Until such notice be given, it shall not be lawful for any person, association or company to transact the business named in the first section of this act," &c. Thus a particular class of acts is made unlawful. What is it? Refer to the first section, and it will be found to prohibit the "carrying and transporting" of goods, and nothing else. This alone is unlawful. It is not unlawful for an Express company to hire a house, buy furniture, safes, horses, wagons, and other usual equipments for the commencement of its business. It would hardly be insisted that one who had sold to an Express company any such things upon credit, must lose the debt, because the contract was unlawful. All these things are incidental and collateral to the main business, which is to transport packages from place to place for hire. So the company, in the institution of its business, may employ agents, contract for their wages, define their duties, and exact bond and security for their performance. None of these things are prohibited. They are necessary and lawful steps to be taken by a company proposing to do a lawful business. It is not pretended that when the bond was made it was the intent of the parties to violate the statute. The bond was then one of those things the company might well require of its agents in making its preparations to pursue its business in exact conformity with the law. It can make no difference that a statement such as the law requires had not then been filed. Suppose the bond made one day and the statement filed the next; does this avoid the bond? Surely no such consequence can follow. The making of the bond and the filing the statement are each merely incidents to the organization of the business, and the order in which they may happen to stand each to the other is a thing quite indifferent. The bond, lawful when made, is not capable of being rendered unlawful by relation. It is not affected by the subsequent illegal acts of the company.

The counsel rather show their eagerness to succeed, than their confidence in this appeal, when they present to this Court the considera-

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tion, "that the action is against two sureties, who must pay the money if the suit be maintained." Of this nothing is known. The record does not disclose by whom the money must be paid. If these gentlemen have ventured to indorse for the defaulter, they ought not to complain even though they may have to pay the money. It is a consequence of their suretyship, foreseen when they made the bond; and its hardship has in it neither law nor logic.

EBERSOLE et al. v. REDDING.

CONTRACTS—PAYMENT.—Notes payable on specified days can not be sooner paid without the consent of the payee. Notes will not be presumed to have been paid before they become due.

PRACTICE.—In actions upon notes and mortgages, any variances between the averments in the complaint and the causes of action filed with it, may be amended on motion, and will be deemed corrected in this Court.

PRACTICE IN SUPREME COURT.—Objections to the terms of the judgment below can not be first raised in this Court.

APPEAL from the *Wells Common Pleas*.

PERKINS, J.—Complaint filed in *November*, 1861, by *Redding v. Ebersole* and wife, to foreclose a mortgage. The mortgage was executed to secure three notes, the first of which became due the 1st of *September*, 1861; the second on the 1st of *September*, 1862; and the third on the 1st of *September*, 1863.

These notes being payable on fixed days, could not be paid before those days severally, unless the payee pleased to consent to receive payment before those days. It would have been otherwise, had they been payable on or before those days respectively. Notes will not be presumed to have been paid before they become due.

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The complaint was accompanied by alleged copies of the notes and a copy of the mortgage, in which the notes were described, and variances between them and the averments in the complaint could thus be obviated by amendment, and would be deemed corrected. See notes to 2 G. & H. p. 291.

The complaint averred that the note then due had not been paid; and if it was defective in not also averring that the two not due were unpaid, the defect should have been remedied by means of a motion, the complaint containing but one paragraph, and that for the foreclosure of the mortgage, which became subject to foreclosure on the non-payment of one note, when due and unpaid.

No objection was taken below to the terms of the judgment, and objections thereto can not be first raised in this Court. *Preston v. Sandford's Adm'r*, 21 Ind. 156; *Baker v. Horsey*, *id.* 246.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

John R. Croffroth, for the appellants.

DAVIS v. JACKSON et al.

PLEADING—REPRESENTATIONS.—An answer to an action upon a note is sufficient, which alleges that the note was given in payment for the last installment on a stock of goods purchased of the plaintiff, which was represented to him at the date of purchase to be worth 3,500 dollars, and that it would invoice that amount or more; that the defendants were ignorant of the amount and value of the stock, and requested an invoice before purchasing; but the plaintiff said he had not time to make it, but assured them that he knew the goods would amount to more than 3,500 dollars; that the defendants

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purchased on this representation; but that it was false, and known to be so by the plaintiff when he made it; and that the goods, in fact, invoiced and amounted to but 1,500 dollars.

APPEAL from the *Rush* Circuit Court.

PERKINS, J.—*Davis* sued *Jackson* and *Lober* on a promissory note.

Answer that the note was given for the last installment of payment for a stock of goods purchased by defendants of *Davis*, and that the latter represented that the goods would amount in value to 3,500 dollars; that they would invoice to that amount and more; that defendants were ignorant of the amount and value of the stock, and requested an invoice before purchasing, but the plaintiff, *Davis*, said he had not time to do that, but assured the defendants that he knew the goods would amount to more than 3,500 dollars; that defendants purchased on this representation; but that the representation was false, and known to be so by plaintiff when he made it, the goods in fact amounting, upon invoice, to but 1,500 dollars, &c.

There was a trial by jury, and a verdict and judgment for the defendants.

The answer was sufficient, and a demurrer to it rightly overruled. *Matlock v. Todd*, 19 Ind. 130. The evidence given on the trial tended to prove it to such a degree that an appellate Court could not, on that point, disturb the action of the jury and Court below. See *Jenkins v. Long*, 19 Ind. 28, and *Estep v. Larsh*, 21 *id.* on page 195. The jury may have inferred that the parties used the word value as indicating the amount to which the stock of goods would invoice. They may have inferred from the evidence that the purchase was made upon the faith of the representations. They may have inferred that the statement of *Davis*, that he had not time to invoice, was a pretext to avoid an invoice, because he

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knew it would show a less stock of goods in value than he had represented.

The purchasers were not bound to rescind. They had a right to keep the goods, set up the fraud as absolving them from paying the contract price, and remitting them to a liability simply, in this case, at all events, for the actual value of the goods. 2 Blackf. 123; 4 *id.* 231; 6 *id.* 108; 6 Ind. 26; *Oldham v. Love*, at this term. Whether there was a new promise, understandingly made, waiving the fraud, was a question for the jury.

The jury, then, may have inferred that, in this case, there was a sale of a stock of goods fraudulently represented to invoice at 3,500, and more, dollars, when the stock invoiced at but about 1,500 dollars. But, as the purchasers did not elect to rescind, they were bound to pay their reasonable value. By the contract, the purchasers were to pay to *Davis*, the seller, two notes on *Harvey Davis* (the son of the vendor) and one *Whiteman*, amounting to 2,500 dollars, and execute their own note, that sued on, for 1,060 dollars. They paid down the notes for 2,500 dollars, and the jury released them from the payment of this 1,060 dollar note. The account, then, stands thus:

Payment	\$2,500 00
Stock of goods purchased, worth.....	1,500 00

Over payment, taking notes at face..... \$1,000 00

The notes, it thus appears, were obtained by *Davis* at 60 cents on the dollar. Considering that they were upon his son, who, whatever was in fact his then condition, might be prospectively solvent, in view of the condition of his father, we can not say the jury erred in placing a value on them, especially in view of the fact that the father had treated them, in the trade, as of the value of the sum expressed upon their

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face, and the further fact that one *Whiteman*, also, was bound for their payment. See *Pratt v. Boyd*, 17 Ind. 282.

The verdict was general for the defendant. This was plainly a clerical omission. In legal effect, it was a finding for all the defendants. There was a single issue between the plaintiff and the defendants for trial, upon a common alleged liability. There was no verdict for the plaintiff.

Per Curiam.—The judgment is affirmed, with costs.

George A. Johnson and Lafe Develin, for the appellant.

Thomas A. Hendricks, Oscar B. Hord and John T. Jackson, for the appellees.

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MUGG et al. v. GRAVES.

PRACTICE—CONTINUANCE.—An application for continuance, to obtain absent testimony, should show the exercise of reasonable diligence to obtain it before.

PRACTICE.—The grounds of objections to evidence should be fully stated to the Court below in order to make them available in this Court.

APPEAL from the *Kosciusko* Common Pleas.

WORDEN, J.—Suit by *Graves* against the appellants upon a promissory note. Judgment for the plaintiff.

Two errors are claimed in brief of counsel for the appellants to have been committed. First, in refusing a continuance; and, second, in admitting improper evidence.

The suit was commenced in *January*, 1861, and the issues in the cause were made up at the same term of the Court, and the cause was continued generally. At the *May* term, it was again continued generally, as was also the case at the

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September term. At the *January* term, 1862, the cause was further continued on the application of the defendants, on affidavit filed. At the *May* term, 1862, the cause was again continued, the plaintiff consenting thereto. At the *January* term, 1863, two years after the issues had been made up, the defendants again applied, on affidavit, for a continuance, but the application was overruled.

The affidavit for a continuance states that one *Howe* was a material witness, &c., and that on the 1st of *November*, 1861, he volunteered to enter the service of the *United States*; that the defendants had been unable to procure his testimony, but believed they would be able so to do by the next term of the Court. It does not state that the defendants were not apprised, before the witness left, that he was about to do so, nor does it show any reason why his deposition might not have been taken before he left. The issues had been made up nearly a year before the witness volunteered, and there was ample time to take the steps to procure his testimony before he left. Under the circumstances, we can not say that the Court below committed any error in refusing a further continuance of the cause.

There was an item of evidence offered by the plaintiff to which the defendants objected, and, upon the objection being overruled, excepted. But no ground of objection was stated, or in any manner pointed out. It has been held in numerous cases, that such an objection is not available; hence we have not examined whether there was any valid objection to the testimony. If there was, it should have been presented to the Court below, so that it might have been understandingly passed upon.

Per Curiam.—The judgment below is affirmed, with costs, and 3 per cent. damages.

E. V. Long and *Edgar Haymond*, for the appellants.

Newcomb & Tarkington, for the appellee.

Garver v. Daubenspeck.

GARVER v. DAUBENSPECK.

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CONTRACTS.—The price for work done in part under special contract, and in part under parol modification of such contract, should be controlled by the special contract so far as it is done in pursuance of it.

PRACTICE—WAIVER.—Error in the progress of a trial, which is not made the basis of a motion for a new trial, is waived, and section 347 of the code, 2 G. & H. p. 210, does not dispense with the necessity for the motion for a new trial on the ground of the supposed error.

APPEAL from the *Hamilton* Common Pleas.

WORDEN, J.—This was an action by *Daubenspeck* against *Garver*, to recover for the building of a house by the plaintiff for the defendant. Verdict and judgment for the plaintiff.

The house, it appears, was built under a special contract, with perhaps some alterations made by the consent of the parties; and on the trial the Court permitted evidence to be given by the plaintiff of the reasonable value of the entire work and materials. Exception was taken to the ruling. It would seem that the contract price should have governed, so far as the work was done under the special contract. *Walcott v. Yeager*, 11 Ind. 84.

But the error, if error was committed, is not before us in such a manner as to be available for a reversal of the judgment. The record informs us that the defendant moved for a new trial, and filed written reasons therefor, but those reasons are not contained in the record; hence, we are not advised that the defendant moved for a new trial on the ground of the admission of the objectionable testimony. The case comes up under the 347th section of the code, but that section does not dispense with the necessity that existed of moving for a new trial on the ground of the supposed error, and the record ought to show that such motion was made. If such

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motion was not made, the error was waived. *Kent v. Lawson*, 12 Ind. 675.

Per Curiam.—The judgment is affirmed, with costs.

B. K. Elliott, E. S. Stone and James O'Brien, for the appellant.

G. H. Voss, for the appellee.

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PRACTICE IN SUPREME COURT.—Where there is some evidence to sustain the verdict of a jury, although the preponderance may appear to be against it, this Court will not reverse the judgment rendered upon it.

PRACTICE—SURPRISE.—Mere surprise at the result of a trial can not entitle the party so surprised to a new trial.

APPEAL from the *Hamilton Common Pleas*.

WORDEN, J.—This was an action by *Brown*, the appellee, against the appellants. The plaintiff and defendants had been partners, and the action was brought to recover a balance claimed to be due the plaintiff on the partnership accounts.

The defendants pleaded, amongst other things, an accounting between the parties, and a final settlement of all the partnership accounts, a balance being found due from the plaintiff to the defendant. Replication in denial.

Trial by jury; verdict and judgment for the plaintiff. A motion for a new trial, founded on the affidavit of the defendants, was overruled, and exception taken.

The evidence is set out; and on the supposition that the affidavit contains matter sufficient to indicate to the Court

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below that the motion was made on the ground that the verdict was not sustained by the evidence, still, we could not, according to the settled practice of the Court, reverse the judgment on that ground, there being some evidence to sustain the verdict, though the preponderance may have been the other way.

On the trial, the accounts of the parties were not, to any considerable extent, gone into, the plaintiff recovering, as would seem, mostly on the ground of admissions and statements made by the defendants as to the amount of profits accruing in the partnership business, the defendants having kept the accounts, and the plaintiff being illiterate, and unable to read or comprehend them. The defendants relied mostly on the alleged settlement.

The affidavit, in support of the motion for a new trial, sets out a statement of the partnership accounts, showing a large balance due from the plaintiff to the defendants. It also affirms that the settlement was made in good faith; and, after alluding to the evidence offered by them in support of the alleged settlement, affirms that they, believing that ordinary prudence required them to rely on the settlement, were not prepared on the trial to show the particulars of the partnership transactions.

If there was any surprise in the case, it was in the result of the trial—a thing that does sometimes surprise those not much accustomed to trials by jury. But was there any such surprise as required the Court below to set aside the verdict and grant a new trial? An issue was made directly on the answer, alleging the settlement. The defendants had notice, by the record, that the plaintiff controverted the alleged settlement; and it is not pretended that the defendants were surprised at the plaintiff's evidence, or the want of evidence on their own behalf; the surprise, as before observed, was simply at the result.

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Perhaps it was within the discretion of the Court to have granted a new trial on the affidavit, but we think it clear that no error was committed in overruling the motion.

Per Curiam.—The judgment below is affirmed, with costs.

D. Moss, for the appellants.

G. H. Voss, for the appellee.



WELLS *et al.* v. THE STATE *ex rel.* THE BOARD OF COMMISSIONERS
OF LAKE COUNTY.

EVIDENCE.—A duly certified transcript, from the books of the county auditor, of the account current of the county treasurer during his term of service, is admissible in evidence under section 283 of the code, 2 G. & H. 183, against the treasurer and his sureties, in an action upon his official bond.

SAME—STATUTES CONSTRUED.—Sec. 132, 1 G. & H. 103, is not inconsistent with section 283 of the code, *supra*, but is cumulative in its provisions.

COUNTY TREASURER AND AUDITOR.—The account current kept by the auditor with the treasurer, is a public record, and if it is erroneously kept, the treasurer may, by proper proceeding, require its correction by the auditor.

APPEAL from the *Laporte* Circuit Court.

HANNA, J.—This was a suit against a county treasurer and his sureties, on his official bond, for failure to pay over to his successor the moneys in his hands, as such treasurer, at the expiration of his term of office. The pleadings were such as to form issues of fact. Trial by the Court; finding and judgment against defendants for some 8,000 dollars, over a motion for a new trial.

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The only point presented to us, is upon the ruling of the Court in admitting evidence. All the evidence given was the official bond, and a certified transcript, from the books of the county auditor, of the account current of the said treasurer during his time of service. The latter was objected to, but admitted. This ruling is complained of.

The act in relation to county auditors provides that:

"Sec. 5. He shall keep an accurate account current with the treasurer of his county, and when any person shall deposit with him any receipt given by the treasurer for any money paid into the treasury, such auditor shall file such receipt, and charge such treasurer with the amount thereof." 1 G. & H. 122.

In an act in relation to county treasurers, it is provided that:

"Sec. 3. He shall give to any person, paying money to him as treasurer, a receipt therefor, which receipt, except it be for taxes, shall be deposited by such person with the auditor, who shall give him a quietus for the same." 1 G. & H. 641.

The reason the receipts given for taxes are not deposited with the county auditor is, we suppose, that the treasurer is already charged by the auditor in the account current with the full amount of taxes placed upon the duplicate, when delivered to him, and is, upon his settlement with such auditor, credited with such sums as he is entitled to as fees, and with such taxes as may be properly returned as delinquent. 1 G. & H. 102.

We have often had occasion to allude to the system of keeping public accounts and public funds in this State as one of checks and balances—one in which the auditor's books should show, at any time, the just balance against the treasurer, supposing all orders drawn to have been redeemed. The auditor is required to draw warrants, or orders, upon the treasurer of the county, for such sums as he is authorized or

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required to pay out, and keep a register thereof, &c. Sec. 4, *id.* 122. If the treasurer has the funds, he pays such orders when presented, and four times a year reports such redemptions to the auditor, and deposits with him the orders so redeemed, *id.* 642, and takes a receipt therefor, *id.*

Thus, it is apparent, that the books so kept by the auditor, in his transactions with the treasurer, are public records, open to the inspection of any person authorized to examine the same, the treasurer among others. If we are correct in this, and we think we are, it follows that section 283, p. 183, 2 G. & H., is applicable; and exemplifications or copies of such records may be admitted as evidence, under the attestation of the auditor, with the seal of office to a certificate in due form. We do not see but that the certificate, &c., annexed to the account current offered in this case, was in the requisite form. It is provided in section 182, p. 108, 1 G. & H., that "in all suits brought against any county treasurer and his sureties, the county auditor shall be a competent witness, and all books and papers belonging to his office shall, when proved by the oath of the auditor, be admissible testimony."

It can not be urged, that, as this section is confined to certain suits, therefore the particular form or class of evidence therein named must in such suits be resorted to. In other words, that the records, &c., of the auditor's office, can not in such suits be made available as evidence in any other mode than as therein provided. It may be that there are papers appertaining to an auditor's office which could not be used as provided in section 283, above referred to. And again, under said section 103, the original books, &c., would have to be produced; and when produced, evidence would be heard that they were the books of the auditor's office, or that they came from the proper repository. 1 Gr. Ev. sec. 485. To avoid the trouble, expense, and especially the inconvenience, that might be occasioned in attempting to carry such books from

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place to place, or in instances where they might be necessary in different places at the same time, the section 283 was adopted, so that properly attested copies of certain records could be used as well as the original. This conforms to sound general principles. 1 Gr. Ev. secs. 483-5, 493-5.

It is urged that the record of the auditor is *ex parte*—might be wrong, and ought not to bind the treasurer. If we are correct, that it is a public record, then it would follow that if, as against the treasurer, it should be made up erroneously, he would have his remedy either against the auditor, or by proper proceedings to correct the record. But whilst it stands, it is entitled to credit to some extent, whether *prima facie* or conclusive, we need not now decide.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

John B. Niles, for the appellants.

James Bradley, for the appellee.

RICHARDSON v. HICKMAN et al.

PLEADING.—An answer, which states facts constituting a bar to a part only of a cause of action, is bad on demurrer, if it be pleaded in bar of the whole cause.

PLEADING—JUDGMENT OF JUSTICE.—A complaint or answer, based upon the transcript of a judgment of a justice of the peace of another State, should aver "that the judgment or decision was duly given or made," or equivalent facts. This is necessary where the judgments are against garnishees in attachment as well as in ordinary cases.

ATTACHMENT—PAYMENT BY GARNISHEE.—If the Court have jurisdiction of the subject and the parties, a payment on execution under

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its judgment will protect the garnishee, though the judgment may have been irregular and reversible on error; and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment. The garnishee should see to it that the Court has jurisdiction.

APPEAL from the *Jay* Circuit Court.

PERKINS, J.—Suit to foreclose a mortgage. The defendant answered:

1. The general denial.
2. Payment.
3. That *Richardson*, the plaintiff, was indebted to *Alfred McDaniel*, in the State of *Ohio*; that *McDaniel* sued *Richardson*, in that State, by attachment against his property, he being a non-resident, before a justice of the peace; that *Laban Hickman*, the male defendant, was garnisheed, in that proceeding, as a debtor of *Richardson*, and ordered to pay, and did pay, on said order, to the justice, 98 dollars and 70 cents, &c.

A demurrer to this answer was overruled. Issues were formed and tried, and the defendants had judgment. On the trial the Court permitted the record of the proceedings and judgments before the *Ohio* justice to be read in evidence, over the objection of the defendants. The proper exceptions were taken.

The third paragraph of the answer was bad for these reasons:

1. It purported to go in bar of the whole cause of action, when it constituted, if well pleaded, but a bar to a part of that cause.

2. It did not set out the facts showing the jurisdiction of the justice, nor aver that his judgments or decisions were duly given or made. *Crake v. Crake*, 18 Ind. 156. This is as necessary where such judgments are relied upon as grounds of defence, as where they are relied on as causes of action.

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And it is as necessary where the judgments are against garnishees in attachment as where they are defendants in ordinary suits.

In Drake on Attachment, sec. 711, it is said, in speaking of payment by garnishees upon judgments against them, that "the judgment under which the payment was made must have been rendered by a Court having legal jurisdiction of the subject matter and the parties. If there be a defect in this respect, the payment will be regarded as voluntary, and, therefore, unavailing." "If, however, the Court have jurisdiction of the subject matter and the parties, a payment on execution under its judgment will protect the garnishee, though the judgment may have been irregular and reversible on error; and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment." To these propositions numerous authorities are cited; and among them, *Hamon v. Birehard*, 8 Blackf. 418. See, also, *Schoppenhast v. Bollman et ux.*, 21 Ind. p. 289.

The garnishee must see to it, when he is summoned as such, that it is a case where the Court has jurisdiction. See *Beard v. Beard*, 21 Ind. p. 321.

The answer being bad, the evidence under it, was improperly before the jury. See *Crake v. Crake*, *supra*.

The evidence given under it was not, except a part of it, admissible under either of the other issues, and that part did not sustain either of them on the part of the defence. The evidence that *Hickman* paid the money to the justice tended to establish one fact, or link in a chain of facts, that, all being established, might have proved payment. For example, if *Hickman* proved that he paid the money to the justice for *Richardson's* use; that the justice paid it to *Richardson's* creditors, and *Richardson* had requested, or perhaps approved such payment, &c., the answer of payment might, to the ex-

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tent of the payment thus made, have been supported by the proof, independent of the judgment.

As it is, the judgment must be reversed. It is, also, objected, that the transcript, illegally in evidence for the reason assigned, was not admissible, because not properly authenticated. This defect can be remedied, if it exists, before the next trial. The statute as to the mode of authentication is plain, and can easily be complied with. 2 G. & H. pp. 181, 182, and notes.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

Walter March, for the appellant.

LONGNECKER v. THE STATE.

CRIMINAL LAW AND PRACTICE.—It is error for the Court, in a criminal case, where there is *any* evidence tending to sustain different views of the case, to instruct the jury that they must limit their inquiries to a particular view or application of it.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—This case was an indictment against *Mary Ann Longnecker* for the murder of her husband, *Samuel Longnecker*, by poison.

She was committed and sentenced to the State's prison for life.

On the trial, two theories were attempted to be maintained, one by the State, the other by the defendant, as to the cause or occasion of *Samuel Longnecker's* death.

The State maintained that he came to his death by being purposely poisoned by his wife.

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The defendant maintained that the deceased came to his death by disease, unskillfully treated by his physicians.

The record shows, we think, that there was some evidence tending to support both these theories, though, as to the latter, it may have been slight. For example, *Dr. Mears*, testifying as an expert upon the facts of the case, said, "could not tell whether he [deceased] had been poisoned, or killed by the doctors, or died of disease." The Court, among other things, instructed the jury thus: "Did *Samuel Longnecker* come to his death by poison or disease? The symptomatic indications of disease and the evidence of medical treatment do not, in my judgment, furnish any evidence that the deceased came to his death by mal-practice in his attending physicians; hence your inquiry, under the evidence, must be confined to the only two other causes," &c.

It was for the jury to judge of the evidence, and the Court had no right to tell them that they *must* limit their inquiry to a particular view or application of it; it tending, as we have said, to prove another hypothesis, to which it might be applicable. Had there really been no evidence tending to show unskillful practice the Court would have committed no error in saying so; but we think the Court erred on the question of fact. But we have doubted whether an objection to the instruction was properly shown by the record. As it was when submitted to us, we were clear that the record did not legally show the objection and exception. The objection and exception, as the record then indicated, were taken to all the rulings of the Court in mass; but, as subsequently amended, it states that the objections and exceptions were severally taken to the rulings of the Court, at the times when they were made, &c.; at least, the record will bear that interpretation.

Considering the character of this case, as one involving the fate of an individual for life, and the further fact that,

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while the record shows that evidence tending, to some extent, to sustain the defendant's theory of the case was given, the jury were told that they must not so consider it, a palpable error, and also, the fact that we can not consider the case upon its merits for the want of all the evidence, we have concluded, though the bill of exceptions is not as explicit in its statement as it might be, to reverse the judgment below.

In *Carter v. The State*, 2 Ind. 617, it is held that, "medical books are not admissible as evidence, but medical men may give their opinions as witnesses, which opinions may, in a measure, be founded on the contents of standard medical books as a part of their general knowledge." See, also, *Lynch v. The State*, 9 Ind. 541.

The judgment below is reversed, keeper of prison to be notified to return prisoner to jail of *Marion* county, *Indiana*, to await a new trial.

Per Curiam.—The judgment is reversed, and it is ordered accordingly.

R. L. Walpole, L. Barbour and J. D. Howland, for the appellant.

W. W. Leathers and George Carter, for the State.

ADDLEMAN v. SWARTZ.

DEPOSITIONS—PRACTICE.—It is competent for the Court, on oral or written motion, to allow a party to re-examine witnesses, whose depositions have already been taken and filed in the cause, and are unpublished and unsuppressed; but such examination can not be made without leave of the Court.

APPEAL from the *Wayne* Circuit Court.

Addleman v. Swartz.

DAVISON, J.—The appellee, who was the plaintiff, brought an action against *Addleman* to require him to deliver up to her a note and mortgage given by her to him, and in his possession, as paid and satisfied.

The facts alleged in the complaint are substantially these: On *September 28, 1860*, the defendant for the consideration of 1,500 dollars, conveyed to the plaintiff the south half of lot No. 163 in the city of *Richmond*; at the time of the conveyance she executed to him three notes for the purchase money, and a mortgage on the lot to secure their payment. The first and second notes, which were for 300 dollars each, have been paid. The third for 600 dollars, and payable at three years, with interest after two years, has a credit of 110 dollars. It is averred that, at the time of the execution of the notes and mortgage, she held promissory notes on one *Joseph Bedsford*, which in the aggregate, amounted to 1,500 dollars, and that, after the payment of the two first notes and the 110 dollars on the third, and before maturity of the third note, viz: in *February, 1861*, the defendant, in pursuance of an agreement with *Bedsford*, agreed with and promised the plaintiff that if she would surrender up and cancel the notes she held on *Bedsford* he, defendant, would release, satisfy and discharge the balance of said third note and the mortgage, and would receive from *Bedsford* his note for 500 dollars, at one year, in full payment and satisfaction therefor. It is further averred that plaintiff, in compliance with the agreement, did then and there surrender up and cancel her notes on *Bedsford*, and that he then and there executed to the defendant his note for 500 dollars, payable in one year, which note he, defendant, received and retained and still holds; but plaintiff in fact says that defendant, in violation of said agreement, did not deliver up, satisfy and discharge said note and mortgage, but has refused and still refuses to do so.

The issues were submitted to the Court who found for the plaintiff, and, having refused a new trial, rendered judgment, &c.

The record contains a bill of exceptions which shows that the plaintiff, at the proper time, moved for leave to retake the depositions of *Josephine Bretsford* and *Levi Loyd*, whose depositions had been taken in the cause and then remained on file, unsuppressed, on the ground that defendant had taken depositions since the plaintiff's depositions were taken, disclosing facts which plaintiff wished to disprove by said witnesses. Which motion the defendant resisted for the reasons that it was not in writing; that no interrogatories or affidavit were filed by the plaintiff, and that no examination of said depositions was made. The Court sustained the motion and granted leave to re-examine the witnesses, without any special directions as to what points they should be examined on, and the defendant excepted.

This exception, it seems to us, is not well taken. "A party may subpoena his witness for a trial without special leave of the Court; but he can not re-examine them without such leave. The rule is the same as to depositions. A party can not retake the deposition of a witness without leave; but the Court will always grant the leave whenever the substantial justice of the case requires it." *Kirby v. Cannon*, 9 Ind. 371, 373; 2 R. S., G. & H., p. 175, sec. 249. Indeed the granting of such leave is a matter within the discretionary powers of the Court, and by its rulings in this instance such discretion does not seem to have been improperly exercised. But in this case the depositions, as retaken, were filed, published and read on the trial without objection in any form, and hence it must be inferred that all objections to them, as evidence in the cause, were waived.

We are not inclined to set out the evidence, as it stands in

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the record, but having examined it carefully we are of opinion that its weight sustains the finding of the Court.

Per Curiam.—The judgment below is affirmed, with costs. *James Perry*, for the appellant.

COE v. MCBROWN.

CONTRACT—TRUST DEED—MORTGAGE.—1. A deed of trust, executed by a railroad company to a trustee, to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, in the granting clause of which the following words are used, "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter acquire, with the superstructure, rails, and *other materials used thereon*," must be construed to embrace *wood* provided for the use of the road from time to time.

2. But such deed of trust is, in legal effect, only a mortgage, and the company have a right to redeem, and that right is a leviable interest, which may be sold on execution.
3. And a sheriff, having a valid execution against such a railroad company, has a right to levy upon and sell its interest in the property of the company, and can not be enjoined from doing so, but the purchaser at such sale would not be entitled to the possession of the property sold until he had complied with the conditions of the mortgage.

APPEAL from the *Bartholomew* Common Pleas.

DAVISON, J.—This was a proceeding by the appellants, who were the plaintiffs, against the appellees, to enjoin the sale, on execution, of personal property. The complaint alleges, substantially these facts? On *February* the 28th, 1851, the *Jef-*

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Jeffersonville Railroad Company were engaged in the construction of their road from *Jeffersonville* to *Columbus*, a distance of sixty-six miles; and they, the Company, being desirous of raising money to be applied to its construction and equipment, did, at that date, execute and deliver to the defendant, *Coe*, a deed of trust, whereby they sold, transferred, and conveyed to him, (in trust, for the benefit of and to secure the persons who might thereafter become holders of bonds, to be thereafter issued by them, under said deed,) "all that part of the road between said points, then constructed, or thereafter to be constructed, together with all and singular, the railways, bridges, locomotives, engines, cars, depots, stations, right of way, and land owned by the company, with all the buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter acquire, upon or for that part of the road between said points, with the superstructure and rails and other materials used *thereon*." * * * "And in case the Company shall fail to pay the principal, or any part thereof, or any interest warrants on any of said bonds, when the same may become due according to the tenor thereof, when demanded, then after sixty days from such default, upon request of the holder of such bond, the trustee, his successors in trust, or assigns, may enter into and take possession of all or any part of said premises and property; and as the attorney, in fact, or agent of the Company, by himself, or agent, or substitute duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations, or additions thereto. And, after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all of said bonds remaining due and unpaid." * * "And it is further understood and agreed, that the Company reserves and retains the right to survey, locate, use and enjoy any extension of road, and any and all branches they may

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deem proper, with all depots, stations, and other erections, privileges and franchises necessary for the same, and to raise money for such purposes by sale of stock bonds or otherwise, which shall be free, clear, and unincumbered from, or in any way affected by this indenture; it being the full intention of said Company to grant to said trustee *no other or further rights or interest than those expressly given in this indenture.* "And nothing herein contained shall be construed to prevent the Company from selling, hypothecating, or otherwise disposing of any bonds, or other securities received by them in payment of stock or otherwise, or any lands or other property acquired, or that may be acquired by them, not necessary to be retained for their road way, depot grounds or stations, nor required for the construction or *convenient use* of that part of said road hereby conveyed, nor from collecting moneys due the Company on stock subscriptions or otherwise. *Provided,* That they shall diligently proceed to collect and faithfully apply all such means to the construction of said road; and, provided also, that no default shall have been made in the payment of the interest or principal of any of said bonds." It is averred that the Company did, thereafter, issue three hundred bonds of 1000 dollars each, bearing interest at the rate of seven per cent. per annum, all under said deed of trust, and of date *March 1, 1851*, payable ten years after date; that two hundred and eighty-nine of these bonds were, (before the rendition of the judgment hereinafter described,) negotiated and sold by the Company, and are now in the hands of *bona fide* holders; that the road was constructed and equipped between the aforesaid points, by and through the means thus raised, and that the bonds all remain unpaid, though the interest thereon has been paid up to *September 1, 1861*.

After the execution of the above deed, viz: on *March 18, 1853*, the Company, for the purpose of raising funds to con-

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struct and equip their road from *Jeffersonville* to *Indianapolis*, a distance of 107 miles, executed and delivered to the plaintiff, *Punnett*, a deed of trust, on all of the road constructed, and thereafter to be constructed between the last named points; together with all property and rights then acquired, or thereafter to be acquired, as set forth in the deed to *Coe*, subject, however, to his deed. The deed of trust to *Punnett*, in its stipulations and covenants, is similar to the one above described, and its purpose was to secure the holders of the bonds of the Company, that might be issued under it. The Company, on *April 1*, 1858, issued 700 bonds of 1000 dollars each, payable 20 years after date, with interest at the rate of seven per cent. per annum; of which 400 bonds were negotiated and sold by the Company, and are now in the hands of *bona fide* holders, and remain unpaid as to the principal. The interest is paid up to the 1st of *October*, 1861.

And plaintiffs, in fact, say, that the proceeds of the road are barely sufficient to pay the current expenses for running the same, and the interest on the bond debts; that all the property and rights conveyed by the deeds of trust, if ordered to be sold by a decree of Court, or sold under the provisions of the deeds, would not pay the amounts specified in the bonds, and that the Company have no means to pay the bonds other than by running the road; that on *October 22d*, 1861, the defendant, *McBrown*, recovered a judgment in the *Bartholomew* Circuit Court, against the Company for 278 dollars, upon which an execution was issued and delivered to the sheriff, who, by virtue of it, levied upon 150 cords of wood, and advertised the same for sale, &c. It is averred that the wood so levied on was purchased by the Company since the execution of said deeds, for fuel to be used in operating and running their road, and for that purpose it is held and owned by them, and to deprive the Company of that "essential element in the use of the road would work irreparable injury to

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the bond holders." Wherefore the plaintiffs pray for an order enjoining the sale, &c.

The defendants demurred to the complaint. The demurrer was sustained, and plaintiffs excepted. Final judgment was accordingly given, &c. The record presents this question: Does the trust deed cover the property levied on by the sheriff? Various cases are cited by the appellants, but in all of them the decision of the Court is made to turn upon the construction of the deed. Thus, in *Coe v. Pennock and Hart*, the "grant," which "was of all the present, and future to be acquired property of the company in the road," &c., was held to be an unreserved conveyance of the entire property of the company, &c. In the deed before us "wood" is not named, but it conveys "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter acquire, * * * with the superstructure, rails, and other materials used thereon." This stipulation seems to cover everything essential to the successful operation of the road. It could not be operated without fuel, and "wood" was, therefore, a "material necessary to be used thereon." The appellees, however, rely on a subsequent stipulation in the deed which reads thus: "The Company reserve the right to survey, locate, and enjoy any extension of the road, and all branches they may deem proper, and to raise money for such purposes by sale of stock bonds or otherwise, which shall be free and unincumbered from, or in any way affected by this indenture. It being the full intention to grant to said trustee no other future rights or interest than those expressly given." The term "wood," it is true, is not employed in the former stipulation, but it conveys material used on the road, and *wood* being such a material, is plainly embraced in the words "other materials used thereon," and is, therefore, "expressly given." As wood

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is essential in operating the road, it was, no doubt, intended to be covered by the grant.

But the deed of trust was, in effect, a mortgage, the Company had a right to redeem, and such right of redemption is a leviabie interest which may be sold on execution. *Heinberger v. Boyd*, 18 Ind. 420. It follows that the sheriff had a right to levy on and sell the mortgagor's interest in the property, and he can not, therefore, be enjoined; though "the purchaser at sheriff's sale will not be entitled to possession of the property sold, until he complies with the conditions of the mortgage." See *Heinberger v. Boyd, supra*; 2 R. S., G. & H., p. 240, § 436. The plaintiffs were not entitled to an injunction, and the result is, the demurrer was well taken.

Per Curiam.—The judgment is affirmed, with costs.

S. Stansifer, for the appellants.

Ralph Hill, for the appellees.

BAKER v. MCGINNISS.

PLEADING.—A complaint is good on demurrer which alleges that the plaintiff purchased of the defendant twenty-seven head of hogs for a price equal to the full value of sound hogs; that the defendant represented them to be sound and healthy; that the plaintiff relied upon said representations, having no opportunity by reasonable diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then affected with hog cholera, and known to be so by the defendant, and that afterwards twenty-five of them died of that disease, &c.

PRACTICE.—Exceptions to instructions given or refused by the Court should be specific, in order to make any error committed by the Court in connection with them available.

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APPEAL from the *Shelby* Common Pleas.

HANNA, J.—Suit to recover damages for fraud in the sale of unsound hogs upon representations that they were sound. A demurrer to the complaint was overruled, upon which the first error is assigned.

The complaint avers that the plaintiff purchased of the defendant twenty-seven head of hogs for a price equal to the full value of sound hogs; that defendant represented them to be sound and healthy; that plaintiff relied upon said representations, having no opportunity by reasonable diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then affected with the hog cholera, and known to be so by the defendant, and afterwards twenty-five of them died of said disease, &c.

It appears to us the ruling on the demurrer was right. Aside from any question growing out of a supposed liability which might be incurred by the sale of a diseased animal, known to be so by the seller, and the failure to communicate that knowledge to the buyer, we have here the additional allegation that affirmative false representations were made and relied on.

The Court instructed the jury at great length in reference to the rights of the parties; the comparative weight to be given to the testimony of interested and disinterested witnesses; the measure of damages, &c. In the application for a new trial, the second reason alleged was that, "the Court erred in charging the jury as the same were charged." So in the assignment of error the second is: "The Court erred in the charge given to the jury." The exceptions to the action of the Court, in giving the charges, was in the same general form, without pointing out specifically any objection. Upon a casual examination it appears to the Court that many of the instructions given were correct, and, therefore, under repeated rulings, we have not sought to ascertain whether

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there is error in said instructions which ought to have influenced the Court in refusing to give the same; or in granting a new trial, if the same had been brought specially and directly to the attention of the judge.

The same kind of general exception was also taken to the ruling of the Court in refusing to give instructions asked. We have looked to this point far enough to see that part of the instructions refused were so refused because they were asked at an improper time, and as to other parts the principles involved and thereby enunciated were embodied in those given.

Per Curiam.—The judgment is affirmed, with 8 per cent. damages and costs.

R. L. & T. D. Walpole, for the appellant.

Hendricks & Hord, for the appellee.

CARPENTER v. SHELDON.

PRACTICE—VARIANCE.—Where it is averred in the complaint that the note sued on was indorsed to the plaintiff by *Caleb Hendee*, and the note offered in evidence on the trial is indorsed by *C. Hendee*, the variance will not be material and the indorsement on the note will be admissible in evidence.

PRACTICE—AMOUNT OF JUDGMENT.—Where a complaint prays judgment for the exact amount due at the first term after suit, but judgment is not then rendered, and is at a subsequent term for a sum larger than that asked for by the amount of the subsequently accrued interest only, such judgment will not be erroneous, but the complaint will be deemed to have been amended so as to demand judgment for the proper sum.

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APPEAL from the *Kosciusko* Common Pleas.

Per Curiam.—Suit on a note by the assignees against the maker for 150 dollars. A copy of the note and indorsement accompanied the complaint. The sum demanded in the conclusion of the complaint was 154 dollars and 25 cents; the sum recovered was 162 dollars, the amount of the note and interest, and was enough to cover the amount due if judgment had been recovered at the first term; several terms of Court having intervened between the institution of the suit and the recovery of the judgment. In the complaint it is averred that *Caleb Hendee*, the payee of the note, assigned it to the plaintiff, but the indorsement filed with the note showed that it was signed by *C. Hendee*.

The introduction of the note, &c., as evidence, was objected to on the ground of this variance. The objection was not well taken. The averment that *Caleb Hendee* indorsed it is not contradicted by the indorsement shown of *C. Hendee*, nor is there any variance, for it is equivalent to averring that *Caleb*, by the name of *C. Hendee*, indorsed.

As to the amount of damages recovered, it is obvious that the complaint in respect to the amount demanded might have been amended in the Court below; sec. 580, 2 G. & H. 278; to correspond with the proof, but it was not done, and we are of opinion that we should here consider the amendment as made, in view of the facts of this case, namely, that it was a suit on a note; that the complaint originally claimed damages sufficient, but that by the accumulation of interest alone the amount recovered exceeded the amount so claimed.

The judgment is affirmed, with 3 per cent. damages and costs.

John L. Ketchum, for the appellant.

Newcomb & Tarkington, for the appellee.

The Board of Commissioners of Parke County v. Lease.

THE BOARD OF COMMISSIONERS OF PARKE COUNTY v. LEASE.

LIQUOR LICENSE—APPEAL—STATUTES CONSTRUED.—Where a license to sell liquor is refused by the county board, and the applicant, under the provisions of the act of *March 11, 1861*, appeals to the Circuit Court or Court of Common Pleas, the decision of such Court is final, and no appeal lies therefrom to the Supreme Court.

APPEAL from the *Vigo* Common Pleas.

HANNA, J.—This was an application by a citizen of *Parke* county for a license to retail spirituous liquors. The Board refused the license. There was an appeal to the Common Pleas Court of the county by the applicant, and he then prayed for and obtained a change of venue to *Vigo* Common Pleas. In the latter Court, upon a default and jury trial, license was ordered, &c. Afterwards, the appellant appealed and sought to obtain a dismissal of the case, on the ground of want of jurisdiction in the *Vigo* Court. The reason urged is that it is not such a case as change of venue could be granted in; that it is such a proceeding as must, under the statutes, be tried and finally decided by the tribunals of the county where it originated. We are referred to Acts 1859, p. 202, and Acts 1861, p. 148, and to *French v. Lighty*, 9 Ind. 475, and to *Aden v. Hostetter*, 16 *id.* 16.

Under the statute of 1861 we are of opinion we can not entertain this appeal. The statute makes the determination of the Circuit or Common Pleas Court to which an appeal may be taken final, therefore we can not look into the case to determine even whether the change of venue was properly taken. If the Court in *Vigo* improperly entertained jurisdiction and made orders, &c., in the case, the remedy is not, in view of the statute, by appeal to this Court.

Per Curiam.—The appeal is dismissed at cost of appellant.
S. F. & D. H. Maxwell, for the appellant.

The Toledo & Wabash R. R. Co: v. The City of Lafayette.

THE TOLEDO & WABASH R. R. Co. v. THE CITY OF LAFAYETTE.

PRACTICE—INJUNCTION.—If illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction.

TAXATION—MUNICIPAL LAW.—Cities, organized under the general law of the State, are authorized to levy an *ad valorem* tax on all property within the cities respectively, and subject to State and county taxation.

TAXATION—RAILROADS.—A railroad company should be taxed, under the law as it now stands, for its "road" as an entirety, including all property in any way used by it in running or operating the road. But the real estate owned by a railroad company, or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as the real estate of private individuals.

APPEAL from the *Tippecanoe* Common Pleas.

WORDEN, J.—Complaint by the appellant against the appellees, to restrain the collection of certain taxes assessed by the city against the company.

Demurrer to the complaint sustained. Exception and judgment for the defendants.

The complaint alleges, in substance, the following facts:

That the city of *Lafayette* is a municipal corporation under the general law of the State for the incorporation of cities, and that *Ridgely* is the treasurer and collector thereof; that the city, through her officers and agents, illegally, &c., assumed to assess a city tax against the plaintiff, in this, by assessing the lots and parts of lots, &c., occupied by the railway, switches, side-tracks, cattle guards, and depot grounds, separately, and as such lots as they originally stood in the several additions to the city; also assessing the road by the mile so far as it runs through the corporate limits of the city. A schedule of the assessment is set out, from which it appears that the plaintiff was assessed for lots and grounds, as such, in the

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sum of 116 dollars and 85 cents, and for $1\frac{1}{2}$ miles of road bed in the sum of 41 dollars and 78 cents. It is averred that the lots, &c., are all parts of the railway property, and used for depot and other necessary railroad fixtures, erections and purposes, for convenience in transacting her railway business. The assessment in question was made for the year 1861, and an assessment on the like principle was made for the year 1862. It is further alleged that *Ridgely*, the treasurer, threatens to seize and levy upon the personal property to make the tax, &c. Prayer for injunction, &c.

If the taxes in question were assessed without authority of law, there can be no doubt that an injunction is a proper remedy to restrain the collection of them. *Greencastle Township v. Black*, 5 Ind. 557; *The City of Lafayette v. Jenners*, 10 Ind. 70.

This leads to the inquiry what taxes may be levied by a city incorporated under the general law, and in what manner are they to be levied. The 42d section of the act for the incorporation of cities, (1 G. & H. 228,) answers the first branch of the inquiry. It provides as follows:

"Sec. 42. The common council shall have power to levy, and cause to be assessed and collected, in each year, an *ad valorem* tax, of not more than 1 per centum, for general purposes, on all property subject to State and county taxation, within such city, and, also, a specific tax on omnibuses, or any carriages, and other vehicles used and run for passengers for hire, unless the same be licensed; and on each dog owned by any resident of such city, of not more than 2 dollars; and on each bitch owned by any resident of such city, of not more than 5 dollars; and, also, a poll tax, not exceeding 50 cents, on every male inhabitant, sane and not a pauper, of the age of twenty-one years, and not exceeding fifty years, residing therein."

By this provision, it will be seen that a city may levy an

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ad valorem tax on all property within the city subject to State and county taxation, as well as the specific tax mentioned. We have no inquiry to make here except as to the *ad valorem* tax; that can only be levied upon such property as is subject to State and county taxation.

In what manner is *ad valorem* tax to be assessed? The 21st section of the same act provides for the making out of a list of persons and property liable to taxation, by the assessor and his assistants, and declares that "such assessor and his assistants shall have the same powers, and be subject to the same provisions of the same law as the assessor of real and personal property for State and county purposes."

Thus, it is clear that it was intended by the legislature that cities, in the collection of an *ad valorem* tax, should not only be confined to such property within the city as is subject to State and county taxation, but that the same law should be observed in regard to the assessment thereof, as governs the assessment of property for State and county taxation. It was intended that cities, so far as an *ad valorem* tax is concerned, should be governed by the same system of assessment as that adopted for the time being for State and county taxation. And whatever changes may be made by the legislature in reference to the mode of assessment for State and county purposes, must also be adopted by the cities. *The Ontario Bank v. Brumell et al.*, 10 Wend. 186.

This makes it necessary to inquire how taxes are to be assessed for State and county purposes, against railroad corporations. On the 22d of December, 1858, an act was approved, amending the 32d section of the act of 1852, to provide for the valuation and assessment of real and personal property. 1 G. & H. 77. The original section, it may be observed, was the foundation, chiefly, of the decision of this Court, in the case of *The State v. Hamilton*, 5 Ind. 310. The amendment is as follows:

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"It shall be the duty of the president, secretary, agent, or other proper accounting officer of every railroad, plank road, turnpike road, slack water navigation, telegraph and bridge company in this State, to furnish to the auditor of the county where their principal office is situated, a list of all the stock in said company and its value, excepting therefrom all lands and their value held in trust or owned by said company that are not used in running or operating their said railroad, plank road, turnpike road, slack water navigation, telegraph or bridge, which list shall be attested by the oath of the officer making the same, and the said officer shall furnish a statement dividing the aggregate amount of said stock amongst the several counties, in proportion to the value of the superstructure, buildings and real estate owned and used by such company in operating and carrying on their said business in each county, and if any such company shall not have in this State its principal office for the transaction of its financial business, it shall be the duty of the president, cashier, secretary, treasurer, engineer, [or] constructing agent of such company, to furnish the auditor of the county where the work first enters the State, a statement under the oath or affirmation of the officer making it, specifying the amount and value of all real estate owned and used by such company in running and operating their said railroad, plank road, turnpike road, slack water navigation, telegraph or bridge within this State, the amount expended in the construction of said work within the lines of this State, and the amount invested in machinery and rolling stock of every kind, which said machinery and rolling stock shall be assessed for taxation in the same proportion to its total amount that the length of the line of the work in this State, completed, bears to the entire length of the line of said work completed, and all the lands owned or held in trust by any of the aforesaid companies, and not used by them in running or operating their

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said railroad, plank road, turnpike road, slack water navigation, telegraph or bridge, shall be assessed for taxation, and the taxes collected in the counties where they severally lie, in the same manner and subject to the same rules and regulations that govern the assessment and collection of taxes on the lands of private persons."

On the day before the passage of the above amendment, the legislature passed an act to provide for the appraisement of real estate, and prescribing the duties of officers in relation thereto. Acts 1858, p. 4. The provisions of this act need not be here specially noticed. On the 4th of *March*, 1859, the 6th section of the act above cited was amended. 1 G. & H. 85. The amendment is as follows:

"Sec. 6. That it shall be the duty of the appraiser appointed in pursuance of this act, within ten days after their appointment, to proceed to list and appraise all the real estate in his county, subject by law to taxation, as follows, to-wit:

"*First.* The said appraiser shall, on actual view, make a true valuation of all lands, together with the improvements and buildings thereon, or affixed thereto, at their full value in money, as he would appraise the same in payment of a just debt due from a solvent debtor, taking into consideration the fertility and quality of the soil, the vicinity of the same to railroads, McAdamized roads, clay roads, turnpike roads, plank roads, State and county roads, cities, towns, villages, navigable rivers, water privileges on the same or in the vicinity of the same, the location of the route of any canal or canals, with any other local advantages of situation: *Provided*, That said appraiser shall also value all lands at their cash value, without taking into consideration any improvement that may be made thereon, and this valuation, as well as the valuation with improvements, shall be set down in proper columns provided for that purpose.

"*Second.* In-lots and out-lots in all towns, cities and villa-

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ges, with the improvements thereon, or affixed thereto, shall be valued at their true and full value in money, taking into consideration all the local advantages of situation. The said appraiser shall also, on actual view, make a true valuation of all lands, town lots, depot grounds and buildings and improvements thereon, other than road beds, switches and side tracks, and railroad tracks and superstructures thereon, used or held by railroad companies, according to the same rule herein prescribed for ascertaining the value of other real property, and he shall in the same manner make a true valuation of all lands and town lots, and buildings and improvements thereon, used or held by all McAdamized roads, plank roads, turnpike roads and canals, other than the *Wabash and Erie Canal*; and all toll bridges belonging to private persons or private corporations, to be valued upon actual view of the premises. The railroad companies of this State shall, on or before the first *Monday* in *April*, 1859, furnish to the appraiser of each county through which their respective roads may run, a written statement of the length of line in his county; also a written schedule of the number and description of all the rolling machinery of such company, or used by it upon such road in doing the business thereof, and the value of the same, in which shall be apportioned to each mile of said road the value of said rolling machinery; said schedule and statement to be verified by the superintendent or manager of such road. The appraisers of the counties through which any road may run, (provided it passes through more than one) shall, on the 2d *Monday* in *April*, 1850, meet at such point on the line of such road, as may be designated by the State Auditor, or in case he fails to designate such point, then at such point as may be agreed upon by such appraisers, and then appraise the value of said road per mile, through their respective counties, including in that valuation the value of all the rolling machinery aforesaid, depots, depot grounds and

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machine shops. In making such estimate of the value of such road, the appraisers shall take into consideration, in addition to the rule prescribed for the valuation of real estate, the location of such road for business, the competition of other roads, its earnings above current expenses and repairs, its condition for present and future business, so as to enable them to arrive at the actual present value of such road, independent of what it cost, or the amount of its indebtedness."

In determining the construction which should be placed upon the foregoing amendments, a question arises whether the latter repeals the former. Wherein they are inconsistent, the former must be regarded as repealed by the latter. If by the latter statute the legislature had attempted to cover the whole subject matter provided for by the former, the former should perhaps be regarded as repealed. *The President, &c., of the Peru, &c., R. R. Co. v. Bradshaw*, 6 Ind. 146.

But there is one provision of the former statute that is in nowise inconsistent with the latter, nor is the subject matter of it covered by the provisions of the latter; and in respect to that provision the former law should, in our opinion, be regarded as unaffected by the latter. We have reference to the latter clause of the amendment of 1858, which provides that, "all the lands owned or held in trust by any of the aforesaid companies, and not used by them in running or operating their said railroad, plank road," &c., "shall be assessed for taxation, and the taxes collected, in the counties where they severally lie, in the same manner and subject to the same rules and regulations that govern the assessment and collection of taxes on the lands of private persons." It is necessary, it may be further observed, that this provision should be regarded as continued in force, in order to the perfection and harmony of the system of taxation contemplated by the legislation in question.

It will be seen at a glance that the system of taxation con-

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templated by these provisions is a very substantial departure from that adopted in 1852. Instead of taxing railroad companies as for stock, they are taxed, under the present system, as for real estate, or, in the language of the statute, as for the "road."

We think the following proposition may be stated as legitimate deductions from the statutes in question :

1st. A railroad company is to be taxed for its "road" as an unit, embracing not only the track, rolling machinery, side tracks and switches, but all depots, machine shops, &c., in short, including all property in any way used by it in running or operating the road. But whether such track of the road, where it runs through different counties, is to be regarded as of equal value, or whether it may be appraised differently in different counties, is a question not involved in this case and need not here be decided.

2d. Real estate owned by a railroad company, or held in trust and not used in running or operating the road, is to be taxed in the same manner as the real estate of private individuals. This is expressly provided for by the amendment of 1858, and is in entire harmony with that of 1859. It is also in harmony with the theory that every thing pertaining to the use and operation of the road is to be taxed unitedly as a road. Many railroad companies may yet have lands received on subscription to the capital stock of the company or otherwise, that have no connection whatever with the use and operation of the road, and there is no just reason why such lands should not be taxed as the lands of private persons. The appraisement of such real estate is amply provided for in the first part of the second clause of the amendment of 1859, and it is no where provided that such lands shall enter into the unit denominated the "road."

From this exposition of the statute it is clear that the city of *Lafayette* had no authority to assess the tax in question

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upon the lots thus held and used by the company in operating her road. The assessment of the tax upon the road, so far as it runs through the city, exhausted her power in that respect, and a further assessment on the lots and lands as such was without authority of law. The demurrer to the complaint should have been overruled.

Per Curiam.—The judgment below is reversed, with costs.

William Z. Stuart, for the appellant.

John Pettit, for the appellee.

GARROLL v. YOUNG.

PRACTICE—BILL OF EXCEPTIONS.—A bill of exceptions filed after the term at which the proceedings excepted to were had, without leave of the Court, can not be considered as a part of the record on appeal. Errors of law, to be available, must be excepted to at the time, but exceptions can not be shown by a bill of exceptions filed after the term at which the alleged errors were committed, unless leave be given.

APPEAL from the *Allen* Common Pleas.

WORDEN, J.—Action by *Young* against *Garroll* and others. Issue, trial, verdict, and judgment for the plaintiff.

The defendants below appeal, though the errors are assigned in the name of *Young* as appellant against the other parties as appellees. As it is apparent that the defendants below, and not *Young*, are the appellants, we shall treat them as such, especially as no question is made as to the manner of entitling the cause in this Court.

The errors assigned are such as can be made to appear only

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by bill of exceptions, and there is no such bill properly in the record.

The record shows that at the *June* term, 1862, the cause was tried, a verdict found for the plaintiff, a motion for a new trial interposed, and reasons therefor filed. Here ends the proceedings at that term. There was no leave given to file a bill of exceptions after the term. At the next term, on the 24th of *October*, of the same year, a bill of exceptions was filed, which sets forth various previous rulings excepted to, and among other things, it states that the Court had overruled the motion for a new trial, to which exception was also taken. The record further shows that afterwards, on the 7th of *November*, 1863, (this is probably a clerical mistake for 1862,) the Court overruled the motion for a new trial, and rendered judgment for the plaintiff. We suppose, taking the record and bill of exceptions together, that the Court announced its ruling on the motion for a new trial at the term at which it was made, but no entry thereof was made until afterwards. The bill of exceptions being filed after the term at which the proceeding excepted to were had, it can not be regarded as part of the record. This point has been so often determined that it would be useless to refer here to the numerous decisions. But suppose that, in point of fact, as possibly may have been the case, the motion for a new trial was not determined by the Court until the *October* term, the bill of exceptions then filed might be good for the purpose of showing what the evidence was on which the verdict was found, and for the purpose of saving an exception to the overruling of the motion. The new trial was asked on the ground of various alleged errors committed on and before the trial, as well as on the ground that the verdict was not sustained by the evidence. As to the alleged errors of law, they must have been excepted to at the time of their commission, and such exception must legitimately appear. This can not be

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shown by a bill of exceptions filed after the term at which the alleged errors were committed, unless leave be given. Hence it does not appear that any errors of law were committed for which a new trial should have been granted.

If the case be deemed legitimately before us on the evidence, on the theory that the motion was overruled at the *October* term, it will not better the appellant's condition as the evidence tends, to say the least of it, to sustain the verdict.

Per Curiam.—The judgment below is affirmed, with costs.

W. S. Smith, and *W. M. Crane*, for the appellant.

Moses Jenkinson, for the appellees.

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RAILROADS—ACCEPTANCE OF CHARTER—CONSTITUTIONAL LAW.—

As to what acts on the part of the corporators constitute an acceptance of a special charter, see the opinion at length.

THE FORT WAYNE AND SOUTHERN RAILROAD COMPANY.—The corporators having accepted the charter before the Constitution of 1851 took effect, it became a valid and binding contract between them and the State, which could not be abrogated or impaired, except for cause.

APPEAL from the *Clark* Circuit Court.

WORDEN, J.—This was an information against the appellees, charging them in substance, with usurping and exercising the powers and functions of a railroad corporation, under the pretended authority of an act of the legislature, entitled, "An act to Incorporate the *Fort Wayne and Southern Rail-*

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road Company," approved January 15, 1849. It is alleged that the corporators named in the act did not accept the charter and franchises until June, 1852; that as there had been no acceptance of the charter up to November 1, 1851, the act was then repealed by the Constitution of the State, which then took effect. Prayer for judgment of ouster.

Issue, trial, finding, and judgment for the defendants.

The case comes before us on the evidence.

In the case of *The State v. Dawson*, 16 Ind. 40, it was held that if the charter was not accepted by the corporators until the new constitution took effect, it was thereby repealed, and no valid organization could thereafter take place under the act. The question was there decided on demurrer. In the case before us, an issue of fact was made and tried; and the evidence shows, as we think, pretty conclusively, that the corporators named in the act did accept the charter before the new constitution took effect.

The act in question provides that *Allen Hamilton* and others, naming them, and their associates and successors in office, &c., "are hereby constituted a body corporate and politic, by the name and style of *The Fort Wayne and Southern Railroad Company*, and shall be able and capable in law to sue and be sued," &c.

It was not only proven that the corporators applied to the legislature for the passage of the act in question, already drawn up as passed, excepting the clause authorizing a repeal; that one of the corporators appeared before a legislative committee, to whom the bill was referred, and on behalf of himself and the other corporators, explained to the committee the objects of the proposed organization; but it was also proven that, after the legislature appended the clause authorizing a repeal in certain cases, such of the corporators as were present, one of whom, at least, appears to have been acting by the authority, express or implied, of those who

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were absent, met together and consulted upon the amendment, and agreed to accept the charter in that form. If the evidence stopped here, it would be clearly sufficient to show an acceptance. "If a peculiar charter is applied for, and it is given, there can be no reasonable ground to doubt of its immediate acceptance." Ang. & Ames on Corp. § 88.

But in addition to this, the evidence shows that in October, 1851, a meeting was held of a majority of the corporators named, when they determined to build the contemplated railroad, under the charter.

The corporators having accepted the charter before the constitution of 1851 took effect, it became a valid, binding contract between the State and the corporators, which could not be abrogated or impaired except for cause.

Per Curiam.—The judgment below is affirmed.

Beal & Brownlee, for the appellant.

R. Crawford, for the appellee.

VANHOUTEN v. VAGEN.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—In this case the question attempted to be raised is in reference to the ruling of the Court in striking out the second paragraph of the answer. There is no bill of exceptions presenting to us the pleading so stricken out, and it is not, therefore, before us; *Adkins v. Hudson*, 11 Ind. 372; nor does the fact that it was contained in the transcript of the justice, before whom the suit was commenced, change the rule. *Grow v. Studabaker*, 14 *id.* 519.

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The judgment is affirmed, with 3 per cent. damages and costs.

Colerick & Jordan, for the appellant.

W. P. Fishback, for the appellee.

BERRY v. BERRY.

APPEAL.—Where no appeal was prayed, and no bond given in the Court below, a cause can not be properly appealed as from an interlocutory order, under the second specification of section 576, 2 G & H. 276.

APPEAL from the *Delaware* Common Pleas.

Per Curiam.—This was an application for partition of lands. After the Court had found the respective shares of the parties and ordered a partition, an appeal was taken to this Court and dismissed, because prematurely taken. *Berry v. Berry*, 13 Ind. 446. The record before us shows that afterwards commissioners were appointed to make partition, who reported that the land was not susceptible of division without injuring the parties, &c. An order was entered and a commissioner appointed to make sale of said lands, from which no appeal was prayed nor bond given. For several terms after this was done the only entries appear to have been orders for continuance. The record is now brought here. See *Staley et al. v. Dorst*, 11 Ind. 367, which is decisive of this.

The appeal is dismissed, at costs of appellant.

Walter March, for the appellant.

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WARREN v. PAUL.

CONSTITUTIONAL LAW.—The provision of the internal revenue act of *July 4, 1864*, requiring writs in State Courts to be stamped is not within the sphere of the legislative powers of the Federal Government, and is inoperative.

SAME—HABEAS CORPUS.—Section 8 of Art. 1, of the Constitution of the *United States* contains a delegation to Congress of power to suspend the writ of *habeas corpus*.

APPEAL from the *Elkhart* Common Pleas.

PERKINS, J.—Suit to recover possession of personal property. Suit dismissed by the Court, on motion of defendant, and a return of property ordered, because papers were not stamped as required by act of Congress. The Court refused permission to plaintiff to affix stamps, in Court, to avoid a dismissal. The internal revenue act of *July 4th, 1864*, enacts that stamps upon legal documents shall be thus:

“Writ, or other original process by which any suit is commenced in any Court of record, either of law or equity, 50 cents.

“Where the amount claimed in a writ, issued by a Court not of record, is 100 dollars or over, 50 cents.

“Upon every confession of judgment, or cognovit, for 100 dollars or over, (except in those cases where the tax for the writ of a commencement of suit has been paid,) 50 cents.

“Writs or other process on appeals from justices’ Courts or other Courts of inferior jurisdiction to a Court of record, 50 cents.

“Warrants of distress, when the amount of rent claimed does not exceed 100 dollars, 25 cents.

“When the amount claimed exceeds 100 dollars, 50 cents. *Provided*, that no writ, summons or other process issued by and returnable to a justice of the peace, except as hereinbefore provided, or by any police or municipal Court having no

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larger jurisdiction as to the amount of damages it may render than a justice of the peace in the same State, or issued in a criminal or other suits commenced by the *United States* or any State, shall be subject to the payment of stamp duties; *And provided, further*, that the stamp duties imposed by the foregoing Schedule B on manifests, bills of lading, and passage tickets, shall not apply to steamboats or other vessels plying between ports of the *United States* and ports in *British North America*.

"Affidavits in suits or legal proceedings shall be exempt from stamp duties."

We quote this, being the latest act, because it involves the question to be decided, which is, has Congress power to tax legal proceedings in the State Courts?

The powers of Congress are delegated by the Constitution; and "the powers not delegated to the *United States* by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively, or to the people."

We start out, then, with the constitutional fact that State governments are to exist concurrently with the *United States* government, possessed of independent powers, beyond the control of the *United States* government; for they, and their people, possess all powers not granted to the *United States*. State governments, then, are to exist.

The powers delegated to the general government are specified in sec. 8 of art. 1. Section 9 of the same article contains restrictions and limitations on the powers granted generally in section 8, and section 10 of the same article contains the prohibitions upon the States.

Section 8 of art. 1, delegates power to Congress to organize Courts, and therein, we may here remark, delegates to Congress power both to authorize the issue, and to suspend the issue of the writ of *habeas corpus*, because that is a judicial writ, and the power to organize Courts includes the power of

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determining what writs they may issue, or not issue, from time to time; hence it was necessary to place the restriction upon the power thus delegated to Congress to legislate for the Courts which is contained in sec. 9, viz: that Congress should not, in so legislating, withhold from them the right to issue the well known judicial writ of *habeas corpus*, except, &c.

But there is no express delegation of power in the Constitution to Congress to legislate for State Courts, and none ought to be delegated incidentally.

The Constitution, in sec. 8, delegates to Congress the power to lay and collect taxes, duties, imposts and excises; but no direct tax shall be laid unless in proportion to the census, and duties, imposts and excises must be uniform, &c.

The Constitution seems to contemplate three kinds of taxes as within the power of Congress, viz:

1. Direct taxes.
2. Duties or imposts.
3. Excises.

Such taxes Congress may lay and collect; and it certainly is not clear that it can any other. 1 Story on Const., §§ 950, 951, *et seq.* The stamp tax upon legal documents does not fall within either of these classes. It is a tax on the right to justice. See Smith's *Wealth of Nations*, p. 371; Say's *Pol. Economy*, 6th Am. ed., p. 460, note; *New Am. Cyclopaedia*, vol. 7, p. 865. *John Stuart Mill*, in his late work on *Political Economy*, classes this description of tax under the head of, "some other taxes," vol. 2, p. 460; and on p. 465 of the same volume he says: "In the enumeration of bad taxes, a conspicuous place must be assigned to law taxes; which extract a revenue for the State from the various operations involved in an application to the tribunals. Like all needless expenses attached to law proceedings, they are a tax on redress, and therefore a premium on injury." He says they have been

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mostly abolished in *England*, since their injustice was so clearly demonstrated by *Bentham*. See Say, *supra*.

But conceding for the purposes of this case that Congress may lay and collect stamp taxes, we hold that they can not be laid, by that body, on proceedings in the State Courts. This question is not entirely new. In 1797 Congress passed a stamp act. The point was then made, that Congress could not even require a license from attorneys to practice in State Courts, but might to practice in the *United States* Courts; and the law then enacted respected the rights of the States in these particulars. Bent. Deb., vol. 2, p. 155; Story's *Laws of United States*, vol. 1, p. 466.

State governments, as we have seen, are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subject to be encroached upon or controlled by Congress. This would be incompatible with their free existence. It was held when Congress created a *United States* bank, and is now decided when the *United States* has given bonds for borrowed money, that as Congress had rights to create such fiscal agents and issue such bonds, it would be incompatible with the full and free enjoyment of those rights to allow that the States might tax the bank or bonds; because, if the right to so tax them was conceded, the States might exercise the right to the destruction of congressional power. The argument applies with full force to the exemption of State governments from federal legislative interference.

There must be some limit to the power of Congress to lay stamp taxes. Suppose a State to form a new or to amend her existing Constitution, could Congress declare that it should be void unless stamped with a federal stamp? Can Congress require State legislatures to stamp their bills, journals, laws, &c., in order that they shall be valid? Can it require the

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Executive to stamp all commissions? If so, where is he to get the money? Can Congress compel the State legislatures to appropriate it? Can Congress thus subjugate a State by legislation? We think this will scarcely be pretended. Where then, is the line of dividing power in this particular? Could Congress require voters in State and corporation elections to stamp their tickets to render them valid?

Under the old confederation Congress legislated upon States, not upon the citizens of the State. The most important change wrought in the government by the Constitution was that legislation operated upon the citizens directly, enforced by federal tribunals and agencies, not upon the States.

Another established constitutional principle is that the government of the *United States*, while sovereign within its sphere, is still limited in jurisdiction and power to certain specified subjects. See *Hopkins v. Jones*, *post*. p. 310.

Taking these three propositions, then, as true:

1. States are to exist with independent powers and institutions within their spheres.

2. The Federal government is to exist with independent powers and institutions within its sphere.

3. The Federal government operates, within its sphere, upon the people in their individual capacities, as citizens and subjects of that government, within its sphere of power, and upon its own officers and institutions as a part of itself.

Taking these propositions as true, we say, it seems to result as necessary to harmony of operation between the Federal and State governments, that the Federal government must be limited, in its right to lay and collect stamp taxes, to the citizens, and their transactions as such, or as acting in the Federal government, officially or otherwise; and can not be laid upon and collected from individuals on their proceedings when acting, not as citizens, transacting business with each other, as such, but officially, or in the pursuit of rights and duties

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in and through State official agencies and institutions. When thus acting, they are not acting under the jurisdiction nor within the power of the *United States*; not acting as subjects of that government; not within its sphere of power over them; and neither they nor their proceedings are subject to interference from the *United States*. Can Congress regulate, or prescribe the taxation of, costs in a State Court? The Federal government may tax the Governor of the State, or the clerk of a State Court, and his transactions as an individual, but not as a State officer. This must be so, or the State may be annihilated at the pleasure of the Federal government. The Federal government may, perhaps, take, by taxation, most of the property in a State, if exigencies require, but it has not a right, by direct or indirect means, to annihilate the functions of the State government.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

WARREN v. PAUL et al.

APPEAL from the *Elkhart* Common Pleas.

Per Curiam.—The judgment in this case is reversed with costs, cause remanded, &c., for the reasons given in *Warren v. Paul*, at this term, the same questions being involved in both cases.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

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BRUMBACK v. PAUL.

APPEAL from the *Elkhart* Common Pleas.

Per Curiam.—The judgment in this case is reversed, with costs, cause remanded, &c., for the reasons given in *Warren v. Paul*, at this term, the questions in the two cases being alike.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

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CONSTITUTIONAL LAW.—1. At the adoption of the Constitution, all governmental power was in the States; and in the division of it made by the adoption of the Constitution, the Federal Government received only what was granted to it, the States retaining the residuum, except so far as it was extinguished entirely by prohibitions upon the States.

SAME.—2. The prohibition of a power to the States did not of itself, operate as a grant of the power to the Federal Government, but rather as an extinguishment of the power as a governmental one where a grant of it was not made in the Constitution to the Federal Government.

SAME—LEGAL TENDER.—3. The power to coin money is one power, and the power to declare anything a legal tender is another, and different power; both were possessed by the States severally at the adoption of the Constitution; by that adoption, the power to coin money was delegated to the Federal Government, while the power to declare a legal tender was not, but was retained by the States with a limitation, thus: "Congress shall have power to coin money," &c. "No State shall coin money"; and "no

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State shall make anything but gold and silver coin a legal tender," &c. States, then, though they can not coin money, can declare that gold or silver coin, or both, whether coined by the Federal, or the Spanish, or the Mexican Government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the States were forbidden to make anything but coin a legal tender, a specie currency was secured in both the Federal and State Governments. There was thus no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of Federal legislation. The money coined by it was the necessary medium.

SAME.—4. The words delegating to Congress power "to coin money," regulate the value thereof and "of foreign coin," do not include the right to make coined money out of paper. If they do, then the States have a right to make such money a legal tender. It does violence to the language to give it such a meaning.

SAME.—5. The power to declare paper a legal tender is not incidental to any power delegated by the Constitution.

APPEAL from the *Boone* Circuit Court.

PERKINS, J.—This suit was instituted upon a promissory note of the following tenor:

"\$500.

March 26, 1862.

"Four months after date we promise to pay to *Oel Thayer*, or order, 500 dollars in gold, value received, without any relief whatever from valuation or appraisement laws.

"JOHN W. HEDGES,

MARTIN C. KLEIGER."

The plaintiff prayed for a special judgment for the gold or its equivalent.

The defendant answered, alleging a tender of the amount due, before suit commenced, &c., in legal tender treasury notes, at their face.

A demurrer was overruled to this answer.

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The plaintiff then replied, showing the depreciation of treasury notes, and the insufficiency of the tender, in amount, on that ground, but the Court held the reply bad, on demurrer.

The Court rendered a general judgment for the plaintiff for the amount of the note, but rendered judgment against him for the costs of suit, on the ground that a valid tender, in treasury notes, had been made before suit commenced.

The plaintiff appealed to this Court.

The points upon the rulings below were properly saved by exceptions.

The tender of the paper in question, in discharge of an express contract to pay in gold, was made, and sustained by the Court below, under the first section of the act of Congress, of *February* 25, 1862, which declares that treasury notes issued pursuant to it, shall "be lawful money, and a legal tender in payment of all debts, public and private, within the *United States*, except duties on imports and interest as aforesaid." Acts of Cong. 1862, (L. & B.'s ed.) p. 345.

If this clause of the act mentioned is constitutional, the tender in question was valid. If not, it was not.

We thus arrive at one of the questions that may be decided.

In considering this question, it will be convenient to first ascertain the precise character and purpose of the treasury note law.

It will not be difficult to do this.

In 1857, an act was passed by Congress, providing for the issue of twenty millions of treasury notes, and empowering the Secretary of the Treasury, among other things, "to borrow, from time to time, such sums of money, upon the credit of such notes, as," &c. Acts 1858, p. 257.

In *July*, 1861, another act was passed, entitled, "An act to authorize a national loan and for other purposes," which authorized the Secretary of the Treasury to borrow 250,-

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000,000 dollars, and to issue bonds and treasury notes therefor, &c." Acts 1861, p. 259.

Again, in *August*, 1861, and again in *February*, 1862, acts were passed in relation to treasury notes as a means of obtaining loans, &c.; though no clause was inserted in any of these acts making the notes a legal tender.

But, on the 25th of *February*, 1862, another act was passed, authorizing a further issue of such notes, the act being one of the series upon this subject of treasury notes, it making reference to the previous acts, and treating the notes to be issued under it as a part of the government securities, but adding a provision additional to those in previous acts, making the notes issued under it a legal tender. Acts 1862, pp. 838, 845.

The purpose of the treasury notes, then, was to raise or supply money, and they pledge the government, upon their face, as security to the holder, to pay money for them. This is the form of the notes.

And the question is, could Congress compel creditors to receive paper in payment, generally, of debts due to them. We speak of the creditor and debtor portions of the mass of the people.

The Congress of the *United States* has, at different times, authorized the issue of three descriptions of paper, viz:

1. Paper by corporations, called banks.

The right to authorize this kind of paper does not come in question in the case at bar. It may, however, be observed in passing, that the Supreme Court of the *United States* has decided that if a bank of the *United States*, is a necessary and proper financial agent of the government, it is constitutional, if not, it is not. The experience of the last twenty odd years seems to establish the fact that it is not such an agent. *McCulloch v. Maryland*, 4 Cond. R. 466.

2. Bonds for money actually borrowed.

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Of the right to issue this paper there is no doubt. The power to borrow money includes the power to execute a written acknowledgment of the debt created by the act of borrowing, and also a written promise to pay the debt.

3. Paper, in the similitude of bank notes, bills of credit, in fact, designed to circulate as money, as well as to accomplish a loan. See *Brisco v. The Bank, &c.*, 11 Pet. Rep. (U. S.) p. 257.

The right to issue such paper is not free from doubt. See *Reynolds v. The Bank*, 18 Ind. 457. It is held not to exist by *Mr. Curtis* in his *History of the Constitution*, vol. 2, p. 329. But the point need not be decided now. What we are at present considering is, can Congress proceed a step further and make paper issued under its authority, money, legal tender in payment of all debts? The answer to this question must be drawn from an examination of the Constitution of the *United States*.

And, first, let us ascertain what, exactly, is the operation of the act of Congress in question?

1. It makes an article other than coin, and an article as thus used, of no intrinsic value, legal tender money.

2. It thereby impairs the obligation of contracts by compelling creditors to receive, in discharge of them, less than half their value according to stipulation.

3. It operates as a fraud on the public creditors, and a hardship upon the honest public servants, by depreciating and debasing the currency.

4. In another aspect, it enables the government to make, by indirection, forced loans as actual if not as oppressive as those of Charles I, as they are made without interest, against the will of the lender, and without repayment of but a part of the principal; thus, in this case, as an example. The government desires *Thayer* to loan it 500 dollars. *Thayer* expresses his inability or unwillingness to spare the money. The government then goes to *Hedges* and *Kleiger*, and says to them,

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you owe *Thayer* 500 dollars, which you are about to pay him. The government wants that money, but he will not loan it. You pay it to the government, and it will give you a piece of paper which it will compel him to take of you, instead of the money contracted for, in payment of your debt.

5. It takes from the citizen his property against his consent and without just compensation.

Can the government constitutionally do these things, is the question?

This is a question of the gravest import. To arrive at a correct answer to it, it will be necessary to somewhat thoroughly analyze the legislative department of the Constitution of the *United States*. That analysis we shall attempt. We shall do it in no partizan spirit. All ought to desire to know aright our Constitution, and discussion and comparison of views are necessary to such knowledge. And especially, in times of difficulty, when the temptation to depart from it may be great, is the duty of watchfulness the more pressing, as the bad precedents of such times become the bad laws of times of tranquillity. Looking forward, as we hopefully do, to the complete suppression of the existing rebellion and the restoration of the Union under our revered Constitution, we are anxious that we may then find it in its integrity, unburdened by bad precedents, dangerous constructions and vicious interpretations.

We do not wish to be understood as intimating that the Constitution is beyond improvement; that progress will not render change necessary; but we do hold that such change, happily provided for in the Constitution itself, should be made in the mode therein prescribed. Ours is either a government of the Constitution, or it is not. If it is a government of the Constitution, then its execution, consistently with the laws made under it, is all the Federal Government that is necessary and proper for the welfare of the nation,

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and all to which the States and people can be rightfully subjected.

The government of the *United States* is one whose sovereignty, limited territorially only by the boundaries of the nation, is yet circumscribed as to the objects upon which it can act. It is a government over specified subject matters. *Warren v. Paul* at this term and case cited, ante, p. 276. Most of the time since the settlement of this country by the whites, the people of the *United States* have lived under two governments acting upon them within the same territory. During our colonial State, we had the British for our general government, and the colonial, for our local governments. And it was one great source of controversy as to how far the British general government should have a right to exercise powers over the internal affairs of the Colonies, which were foreign and independent as to each other, but domestic and subject as to the British government. It was agreed that there were some matters pertaining to the general welfare of the Colonies as a whole, such as their foreign and inter-colonial trade, their common defence against the Indians and foreign enemies, which should fall within the power of the general government; but their internal, domestic affairs, the general welfare of the people of the several Colonies, and of the several Colonies themselves, in their domestic affairs, almost everything, indeed, except their common foreign relations, the colonists claimed should be left to the care and judgment of the people, and colonial governments, as the powers best calculated to manage them wisely and economically, and as the most safe to be trusted with them. The reader of history will not require citations of authorities to this point. One of the charges in the Declaration of Independence was that the King had assented to acts of Parliament for suspending our legislatures, and declaring that the Parliament had power to legislate for us in all cases whatsoever.

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By the Declaration of Independence, the Colonies threw off the British general government, rather than to submit to its encroachments upon matters pertaining to their several domestic, instead of confining its action to their foreign aggregate general welfare.

It then became necessary for them to create a new general government to manage matters pertaining to their general welfare, which term they used during their colonial State, as applicable mostly to matters connected with their foreign and inter-State relations, which latter were really then foreign, as the States were separate sovereignties.

The new general government was created by the Articles of Confederation, in 1788. There was no general government of authority, force, power, succeeding the British, before these Articles.

The first of these articles was this:

“The style of this confederacy shall be, ‘*The United States of America.*’”

The third was as follows:

“The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.”

This was the second:

“Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the *United States* in Congress assembled,” [or prohibited to the States.]

The part in brackets, which we have added, is necessary to the expression of the exact fact; for the articles not only

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granted powers to the general government, but also prohibited some to the States.

The Union and general government, then, were formed to provide for the general welfare of the *United States*, but what was embraced by the term, general welfare; what powers might Congress exercise, and over what, in promoting it; what subjects were considered as pertaining to the general welfare designated in the organic law of the government?

This question is answered by showing the subjects over which power was given to Congress.

The principal powers were granted by Art. 9, and were these, as far as need here be set forth:

"SEC. 1. The *United States* in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article, of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the *United States* shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; *Provided*, that no member of Congress shall be appointed a judge of any of the said courts.

"SEC. 4. The *United States* in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority,

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or by that of the respective States; fixing the standard of weights and measures throughout the *United States*; regulating the trade and managing all affairs with the Indians, not members of any of the States: *Provided*, that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post offices from one State to another, throughout all the *United States*, and exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the *United States*, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the *United States*; making rules for the government and regulation of the said land and naval forces, and directing their operations."

The prohibitions of power to the States were contained in art. 6, which we copy. The prohibitions related to general, mostly to foreign, affairs, as appears by the article, thus:

"ART. 6.—SEC. 1. No State, without the consent of the *United States* in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty, with any king, prince, or State, nor shall any person, holding any office of profit or trust under the *United States*, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the *United States* in Congress assembled, or any of them, grant any title of nobility.

"SEC. 2. No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the *United States* in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

"SEC. 3. No State shall lay any imposts or duties which

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may interfere with any stipulations in treaties entered into by the *United States* in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

"SEC. 4. No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the *United States* in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the *United States* in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

"SEC. 5. No State shall engage in any war without the consent of the *United States* in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the *United States* in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the *United States* in Congress assembled, and then only against the kingdom or State, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the *United States* in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until

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the *United States* in Congress assembled shall determine otherwise."

Thus was clearly specified the national matters included in the term, general welfare. It had acquired a tolerably definite meaning, and was applied to subjects pertaining to foreign and inter-State relations.

And by art. 8, it was ordained that:

"All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the *United States* in Congress assembled, shall be defrayed out of a common treasury," &c.

But the Articles of Confederation were extremely defective as a frame of government, particularly in points specified below. They violated the first principles upon which free governments, as well as efficient ones, must be framed.

1. They did not divide the legislative power between two branches.

2. They did not properly separate the legislative, executive, and judicial functions, assigning each to a separate department, but left them, mainly, in one body.

3. They did not empower Congress to lay duties, imposts, &c., to supply the government with money wherewith to pay the debts and expenses of the government, and as a means of regulating commerce.

4. They did not empower the government to levy taxes upon, and, through its own instrumentalities, collect them of the people for the purpose of paying debts, &c.

5. Generally, the government, under them, operated, in executing the powers it possessed, upon States, not upon individuals, and hence had no coercive power upon the States; which power is possessed under the present Constitution, by operating directly on the people of a State.

6. We may remark as a fact, that they made no provision for the return of fugitives from labor, &c., though such pro-

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vision it is not pretended was a necessary element in a government.

The most immediate and pressing embarrassment experienced by the government under the Confederation, sprung from its inability to raise money wherewith to pay the debts and provide for the common defence and general welfare of the *United States*. As soon as peace was established, says *Mr. Curtis*, (*Hist. Const.* vol. 1, p. 384,) it became apparent, that while the Confederation was a government with the power of contracting debts, it was without the power of paying them. *Id.* p. 173, *et seq.* But the Congress did not claim that, under the pressure of necessity, or a latitudinous construction of the general welfare clause of the Articles of Confederation, it could assume power to raise money. The written charter of powers specified what might be done to provide for the general welfare; it clearly indicated the scope and meaning of that term, and Congress, in its actions, conformed thereto. But efforts were immediately commenced to procure from the States a further grant of power, by way of amendment to the Articles of Confederation, to enable Congress to levy duties, &c., for the express purpose of paying the debts, &c. The efforts were unsuccessful, but they resulted in the call of a national convention to revise the Articles of Confederation; which convention formed our present Constitution. And one of the leading objects, expressed at the time of calling the convention, was to obtain a grant of power to Congress to lay duties and taxes for the purpose of, or in order to pay the debts, and provide for the general welfare, &c. *Curtis, supra*; 1 *Kent*, 216; 1 *Story* on *Const.* sec. 255.

The proposed convention met in *Philadelphia* in 1787, and, in its action, departing from the purpose of simply amending the articles of confederation, went upon the theory that the continuity of the government was to be broken, the old con-

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stitution to be abrogated, and the new one to become the government of those States only which should voluntarily adopt it. It was not to be imposed upon any State by coercion. This is manifest from the fact that the new Constitution provided that it should be the government of the States adopting it; art. 7; and the further fact that the first Congress, under the new Constitution, in its legislation, classed those States which had not adopted the Constitution as foreign States. See 20 Ind. on p. 506. Hence, the correctness of the proposition of *Webster*, in his letter to *William Hickey, Esq.*, on the 11th of *December*, 1850, that: "The Constitution of the *United States* is a written instrument; a recorded fundamental law; it is the bond, and the only bond, of the union of these States; it is all that gives us a national character." See the letter in the introduction to "The Constitution," by Hickey.

Hence, at the formation of the present Constitution, we may look upon the several States of the Union as remitted back to the possession, severally, of the entire sovereignty and independence of a nation; and as about, by the Constitution they were then forming, to severally voluntarily surrender a portion of that sovereignty to a new general government of their own creation; as about making a division of the sovereignty they then possessed with that government; giving it power over certain specified objects of a general nature, those pertaining to the general welfare of all the States in common; and, we may remark, it was one of the purposes of the Constitution mentioned to clearly define the subjects over which the proposed general government should have jurisdiction, to mark the boundary line of its authority, so that such controversies as had been had with the *British* General Government as to the extent of its rightful powers might be entirely avoided, and encroachments by the new general government prevented.

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We look, then, to the letter of the Constitution to ascertain the powers, vested by its grants, in the general government, interpreting it in the light of its history where it may be ambiguous. And, we may add here, that war does not increase, nor peace diminish, the quantum of power actually granted to administration by the Constitution.

Indeed, it may not improperly be said that the Federal Constitution *is the Government of the United States*, though in common parlance we apply that term to administration. It was *the Constitution* that the convention formed, and the people ordained for their government. That Constitution provided for installing temporary administrations to administer, to execute the provisions of the Constitution, but it constituted no body of men as the government. It provided for placing men temporarily in office to execute the powers specified in the Constitution, and nothing more. The very preamble of the instrument declares this. It is:

“We, the people of the *United States*, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION FOR THE UNITED STATES OF AMERICA.”

This Constitution, then, is, in fact, the government, created by our fathers, and when it dies, that government expires. And officers that carry on a government independent of a Constitution, constitute but a *de facto* government of assumed and unlimited powers. The Constitution is superior to administration, not administration to the Constitution.

Mr. Webster, in his great debate with *Hayne* on *Footes* resolution, in 1830, expressly asserted that the Constitution was the Government of the *United States*. He said: “They [our fathers] ordained such a government; they gave it the name of a *Constitution*,” &c.

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And the government thus created, let it be remembered, is complete within itself. It contemplates every contingency, and makes provision for each and all, and indicates the powers, embracing all that are necessary and proper, that administration may exercise in each and all. To assume the contrary, would be against the fact, and an impeachment of the wisdom of the fathers who made the Constitution. It provides for the time of peace, and the powers of administration therein. It provides for the contingency of foreign war, and the powers of administration therein. It provides for the contingency of insurrection and rebellion, and specifies the powers, and all the powers, necessary and proper to be exercised by administration therein. And the country had had experience in all these exigencies when the Constitution was formed.

The importance, then, of carefully studying that Constitution, assuming it to be still a living instrument, is manifest. Let us examine it. It creates three departments, and prescribes the manner of filling them with officers, and the powers and duties of the officers occupying them. The Constitution commences by declaring that:

“All legislative powers herein granted shall be vested in a Congress of the *United States*, which shall consist of a Senate and House of Representatives. [But] The powers not delegated to the *United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Amendment 10.

This, then, locates all the governmental power in the *United States* that can be exercised by a legislature. A part of it is granted to the Federal Congress; and that part is all that it can exercise. All of the remainder, being that which is not extinguished by the prohibitions upon the States, is in the States and the people. The powers granted to Congress are these:

“Sec. 8. The Congress shall have power: To lay and col-

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lect taxes, duties, imposts and excises, [in order] to pay the debts, and provide for the common defence and general welfare, of the *United States*; but all duties, imposts and excises shall be uniform throughout the *United States*. [The words, 'in order,' are inserted to express plainly the real meaning as historically proved above, and upon the authority of Walker's Am. Law, 4th ed., p. 125; 1 Story on Const. sec. 908, *et seq.*; 2 Curtis Hist. Const. p. 318, *et seq.*] To borrow money on the credit of the *United States*; to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the *United States*; to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the *United States*; to establish post offices and post roads; to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the *United States*, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, ac-

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cording to the discipline prescribed by Congress; to exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the *United States*, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

Where, among this list of granted powers, is that to make legal tender money of paper? It is certainly not found among these express grants. And it would seem that it can not be treated as incidental to any granted power. It would seem that the power to declare what shall be money must be, in itself, a substantive power of the highest character; it has been so regarded in the history of nations. The convention so treated it in framing our Constitution, and prohibited it to the States, and expressly granted it to Congress, and expressly defined out of what it might be made, thus excluding the idea of a power in Congress to make it of anything else.

And here we can not forbear to step aside a moment from the line of discussion, appropriate to the case at bar, to notice another question of public interest, viz: that of the power to authorize the issue and suspension of the writ of *habeas corpus*. The Constitution places this power in Congress. It is contained in the clause, "to constitute tribunals inferior to the Supreme Court;" that is, to create Courts of original jurisdiction, and define their powers and regulate their practice. The *habeas corpus* is a judicial writ. It is issued at common law, or withheld only by Courts in given cases; and the power delegated to Congress to create and regulate Courts, is a power to that body, to grant to or withhold from Courts the right to issue or suspend judicial writs, among them that of *habeas corpus*. Hence, the propriety, necessity even, of

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the clause in section 9 of the Constitution, the whole of which is devoted to limitations on the legislative powers granted to Congress generally in section 8, above quoted, forbidding Congress, in legislating upon the Courts, to authorize them to suspend or withhold the writ, except when Congress might so provide in cases of rebellion or invasion. See the *habeas corpus* act of 1789, in Brightly's Dig. p. 301; also *Griffin v. Wilcox*, 21 Ind. 370, and *Warren v. Paul*, ante, p. 276.

Returning from this digression to the point of departure, viz: that there was no express power granted to Congress to make paper a legal tender, we proceed to further illustrate that point. In doing so, we commence by laying down the following propositions:

1. At the adoption of the Constitution, all governmental power was in the States; and in the division of it, made by the adoption of the Constitution, the Federal Government received only what was granted to it, the States retaining the residuum, except so far as it was extinguished entirely by prohibitions upon the States.

2. That the prohibition of a power to the States did not of itself operate as a grant of the power to the Federal Government, but rather as an extinguishment of the power, as a governmental one, where a grant of it was not made in the Constitution to the Federal Government.

3. That the power to coin money is one power, and the power to declare anything a legal tender is another, and different power; that both were possessed by the States severally at the adoption of the Constitution; that by that adoption, the power to coin money was delegated to the Federal Government, while the power to declare a legal tender was not, but was retained by the States with a limitation, thus: "Congress should have power to coin money," &c.; "no State shall coin money," and "no State shall make anything but gold and silver coin a legal tender," &c. States, then, though

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they can not coin money, can declare that gold or silver coin, or both, whether coined by the Federal, or the Spanish or the Mexican Government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the States were forbidden to make anything but coin a legal tender, a specie currency was secured in both the Federal and State governments. There was thus no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of Federal legislation. The money coined by it was the necessary medium.

4. That the words delegating to Congress power "to coin money," regulate the value thereof, and "of foreign coin," do not include the right to make coined money out of paper. If they do, then the States have a right to make such money a legal tender. It does violence to the language to give it such a meaning.

We next proceed to inquire whether the power to declare paper a legal tender, on the supposition that such power could be an incidental one, is a necessary and proper incident to any granted power, as a means of carrying such power into effect; for the grant of a substantive power carries with it necessary and proper incidents where they are not expressly withheld. They were withheld in the articles of confederation, but were expressly restored in the Constitution, thus: immediately following the express delegation of powers is added, "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the *United States*, or in any department or officer thereof." And we lay down the proposition at the outset that no power, in itself a substantive one, can be exercised or contravened by action under an incidental power. And the further proposition that where a substantive power is granted in a given form and to an exactly defined extent, or is thus withheld,

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the grant or prohibition can not be exercised or contravened by a power claimed as incident to some other substantive power. Hence it would seem clear that the granted power to coin money out of coin, can not be enlarged as an incident to the grant of some other power, into a power to issue paper money.

Even the President of the *United States*, by virtue of his powers as commander-in-chief of the army and navy, can not by his orders protect his subordinate officers from liability to damages for illegal acts they may perform under such orders. At least, it was so decided by the *United States* Supreme Court in *Little v. Barreme*, 1 Cond. Rep. 378; see, also, *Griffin v. Wilcox*, 21 Ind. 310. There is a limit to incidental powers in all departments of the government. *Griffin v. Wilcox*, *supra*. Recurring, then, to the above grant of incidental powers, we are not aware of any one, among the "other powers vested by this Constitution," &c., mentioned therein which would authorize this legal tender law; to which one of the grants, or to what combination of those quoted, is such a law a necessary incident? For Congress, as has been said, can not legislate upon the internal domestic affairs of the States and people, any further than the particular subjects confided to Congress reach, no further than is necessary to carry into effect the special powers granted. For example, Congress could not pass a law regulating, generally, evidence or practice in State Courts; registry of deeds, marriage contracts, limitation or usury laws, or contracts of renting, purchase and sale of property, &c., in *Indiana*, except where they were made with the general government, its officers, &c., or where the law was touching some matter, such as the post office, process in Courts of *United States*, &c., within the domain over which the Constitution grants power to Congress. *Griffin v. Wilcox*, *supra*. See the very able opinion of Judge Denio in the case of *Meyer v. Roosevelt*, in the N. Y. Court of

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Appeals, *September*, 1863, in most of which this Court fully concurs. Particularly do we concur with him in the position that it does not follow, from the fact that Congress can prohibit the taxation of treasury notes by States, that it can also force one private citizen to take them of another for what they are not. The reasoning of those judges who thus hold is this: Congress can prohibit States from taxing government paper; therefore it can force a citizen to take it as gold. Congress can prohibit States from taxing government mules; therefore, if one citizen has a contract with another to furnish him a milking cow, Congress can compel him to take a mule as being a cow; Congress, in that case, having the power to make a mule a cow by enactment. But, says Lord Bacon, "gold hath these natures, greatness of weight, closeness of parts, fixation, pliantness or softness, immunity from rust, color or tincture of yellow; therefore, the sure way, though most about, to make gold, is to know the causes of the several natures before rehearsed, and the axioms concerning the same. For if a man can make a metal that hath all these properties, let them dispute whether it be gold or no." Bacon's Works, by Montague, vol. 2, p. 50.

Congress, as we have seen, takes no power under the general welfare clause, as that is not a grant of any power, but a mere expression of one of the ends to be accomplished by the exercise of the powers granted. And should Congress assume, upon its own ideas of general welfare, to exercise other powers than those granted, to carry them out, it would simply, to that extent, set up a despotism.

The legal tender law is not an incident of the power to borrow money, because that power does not, in any reasonable view of the subject, imply the power to make forced loans, to take the citizens property without his consent, and without just compensation. To borrow, is not generally understood as taking by force or fraud. We have seen that the

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legal tender paper clause is an authority to make, by indirection, forced loans. It is not an incident of the power to raise armies, because the Constitution has expressly provided the modes of raising money to pay them; hence, incidental modes are excluded, unless the incidental legislation be limited to operate upon the army itself. It is not an incident of the power to regulate commerce with foreign nations, between the States and with the Indian tribes. The legal tender law is not an attempt to regulate such commerce, except so far as it attempts to provide a medium of exchange of productions. But the Constitution has fixed that medium, viz: coined money; paper is not only not a "necessary and proper medium for such exchange;" it is not one of a class of means consistent with the Constitution; it is one which the commercial republic of the world actually rejects, and which the power of government can not compel it to accept. And whether it is of the class of proper means is a judicial question. 1 Kent 254. Gold and silver have been chosen by the commercial world as the medium of commercial exchanges and the measures of commercial values; chosen, not by the compulsion of governments, but voluntarily, from utility and convenience, and governments acquiesced in the choice and sanctioned it, and no power of government can compel their abandonment. See Smith's Wealth of Nations, pp. 16, 176, 179. They became legal tender by the *lex mercatoria* of nations, and contracts, made without specifying a medium of payment, were understood, by the law of nations, to be payable in coin. The history of the world shows this. Say's Pol. Economy, p. 222; 2 Mill's Pol. Economy, p. 19; 18 Ind. 471. Coin was the sacred currency as well as profane, of the ancient world. Historically considered, we find that the Almighty, and his Prophets and Apostles, were for a specie basis; that gold and silver were the theme of their constant eulogy. Abraham, the patriarch, 1875 years before Christ, being about 3740

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years ago, purchased of *Ephron*, among the sons of *Heth*, the field in which was the cave of *Machpelah*, shaded by a delightful grove, for the burial place of his dead; and he paid for it "400 shekles of silver, current money with the merchant."

Gen. 23, 16. So *Solomon*, the wisest of men, seems to have had a decided preference for a hard money currency. In 1st of Kings, chap. 9, verses 27, 28, for example, it is said: "And *Hiram* sent in the navy his servants, &c., and they came to *Ophir*, and fetched from thence gold 420 talents, and brought it to King *Solomon*." And in chap. 10, verses 14, 15 and 29: "Now the weight of gold that came to *Solomon* in one year was 666 talents, besides that he had of the merchant-men, and of the traffic of the spice merchants, &c.; and a chariot came up and went out of *Egypt* for 600 shekels of silver, and a horse for 150 shekels," &c. Again, the prophet *Jeremiah*, one of the "greater prophets," says, chap. 32, verses 9 and 10: "And I bought the field of *Hanameel*, my uncle's son, that was in *Anothoth*, and weighed him the money, even 17 shekels of silver, and I subscribed the evidence and sealed it, and took witnesses, and weighed the money in the balances."

Walker, in his *Am. Law*, p. 145, declares it an act of despotic power to make paper a legal tender. The principal interference of government with the currency has been to debase it. *Say* gives an account of the acts of the French monarchs, of this character, in his *Political Economy*, book 1, chap. 21, § 5, and adds: "Let no government imagine that, to strip them of the power of defrauding their subjects, is to deprive them of a valuable privilege," &c. Says *Mr. Gouge*: "No instance is on record of a nation's having arrived at great wealth without the use of gold and silver money. Nor is there, on the other hand, any instance of a nation's endeavoring to supplant this natural money, by the use of paper money, without involving itself in distress and embarrassment."

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It was the intention, by the Federal Constitution, to withhold this power of supplanting natural money from the general government, and to strip the States of it, and thus extinguish it, and insure to the people and nation a sound currency forever. Of this we have not the slightest doubt. Money should be to values, what weights and measures are to quantities, the exact measure, and a uniform, stable one. The States were prohibited from making anything but gold and silver a tender for debts, and the general government was authorized, touching this subject, only "to coin money, regulate the value thereof, and of foreign coin," and to provide for punishing the counterfeiting of two things, viz: the "securities," that is the bonds, &c., and the "*current coin of the United States*," that is the circulating money, coined by authority of Congress. It will be observed that while the States are forbidden to make anything but gold and silver a tender, Congress is empowered to coin money, without being limited to the two kinds of coin to which the States are restricted. Hence, Congress has, for small change, coined copper; but that the term, "to coin money," means to make money out of coin, and nothing else, the history of the Constitution, as well as the natural interpretation of the words, demonstrates. If the words "to coin money," mean to coin it out of paper, then the words "foreign coin" include any paper money coined by any foreign government, and the clause in which they occur authorizes Congress to make such paper a legal tender among our people; for if paper can be coined, why, it is coin, after it has been coined. Hence we are clear that the paper legal tender law is not an incident of the power to coin money. It is not an incident to the treaty making power. Acquisition of territory, we admit to be a natural incident of that power. Boundaries between nations must be fixed by treaty, and the final possession of conquered territory at the end of a war must be determined by treaty; and

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pecuniary obligations may, also, be imposed upon the nation by such treaty arrangements. A treaty is a bargain which the Constitution authorizes the government to make, and it may relate to land or money, &c.; but the money to discharge the obligations thereby created must be raised in the modes prescribed by the Constitution.

It is not an incident of the power to collect the dues and pay the debts of the *United States*. That power, in connection with the constitutional provision, that the laws of the *United States*, made pursuant to the Constitution, shall be the supreme law, may well enough justify the act giving the *United States* priority of payment out of the effects of an insolvent debtor. See *Conrad v. The Atlantic, &c. Co.*, 1 Pet. U. S. Rep. 385.

It will be observed that we here say nothing about the necessity or propriety of authorizing, in any exigency, paper like bank paper, so secured as that it shall be voluntarily circulated as currency by the people; they receiving it, not by compulsion, but freely, through confidence that its final redemption is certain and near. That question is not before us. Treasury notes might thus circulate without legislative compulsion.

A further view of the question, in brief.

The Constitution declares that Congress shall have power "to coin money, regulate the value thereof, and of foreign coin;" and that "no State shall coin money, or make anything but gold and silver coin a tender in payment of debts."

Now, the power is no where expressly given to Congress to make even coin a legal tender, but the prohibition to the States to make anything but gold and silver such tender, goes upon the assumption that the power over the subject of legal tender is possessed by the States; see *Hopkins v. Jones*, post, p. 310; and the Constitution restricts them to two articles, either or both of which they may make thus; and the general gov-

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ernment has not the power to make anything a legal tender except as an incident to the power to coin. It is, perhaps, a fair incident to the expressly delegated power to make money of coin, to make the thing coined as money a legal tender in transactions within the sphere of legislation by Congress, but certainly nothing beyond that thing; for that would be drawing a second incident from a first; hanging an incident upon an incident, which certainly, we think, could not be done. State the argument.

Congress has express power to make money out of coin. Incident, perhaps, thereto; to make such coin a legal tender. Can we now, with a show of reason, add that incident to the doubtful incident of making coin a legal tender, may be exercised the substantive power, not expressly granted, of making paper legal tender money?

But we will not pursue this discussion of the constitutional question. We feel entirely justified in calling attention to the subject to the extent of the remarks we have made, as pursuing one of the modes by which the memory of the Constitution may be kept alive, and interest in its preservation excited.

It is contended that we might decide this case on the ground that the suit is on a note payable in a specific article. That note is not payable, by its terms, "in specie," nor "in coin," nor in "gold and silver," nor generally, but "in gold." Now gold is used as an article of merchandise, of manufacture, &c., as well as for currency and a standard of value. And if a contract is made between two parties in which one gives to the other a consideration for his promise to deliver to him in the future a quantity of gold dust, bullion, coin, or simply of gold, why shall not such contract be enforced? Such the contract sued on must be taken to be. And if the defendants can, by virtue of the legal tender paper law, discharge their promise to pay gold, by paying paper at its face, which is

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less in value, by more than half, than the gold, then the obligation of the contract has been impaired and the plaintiff has been deprived of more than half of his property, in the given case, without compensation. Such is the incontrovertible fact. And is it possible that the Courts are without power to redress such wrongs? See art. 5, amendments to Const. U. S.

Courts may decree specific performance of contracts for personal property, or give equivalent damages, where it may be necessary to effectuate a just result between the parties. This is well settled. Fry on Specific Performance, Am. ed., side p. 13, top p. 55, notes; 2 Story's Eq., sec. 717, *et seq.*; *Chamberlain v. Blue et al.*, 6 Blackf. 491. Judge Story says: "Whenever, therefore, the party wants the thing in specie, and he can not be otherwise fully compensated, Courts of equity will grant him a specific performance." "And this constitutes the true and leading distinction," &c.; "it does not proceed upon any distinction between real estate and personal estate." "The truth is, that, upon the principles of natural justice, Courts of equity might proceed much farther, and might insist upon decreeing a specific performance of all *bona fide* contracts." Story, *supra*.

The circumstances under which the note in question was given, might, perhaps, appear on a new trial. Law and equity are both administered under the code in one form of proceeding.

But a majority of the Court are not prepared to decide the case on this latter ground. If the legal tender notes are money, coin, they are the standard of value, they are the measure of all other values, and nobody can be compelled to pay more than the face value of the standard of value in money. This, in itself, shows the folly of attempting to declare that to be the standard of value which the commercial

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and financial republic of the world always has and always will reject as such.

Having fully presented the views of the Court on the constitutional question, in which we unanimously hold the legal tender provision void, we shall as we did in the case of *Reynolds v. The Bank of the State*, 18 Ind. 467, and for the reasons there given, *pro forma*, affirm the judgment below. We are advised that the question is before the Supreme Court of the *United States*, the ultimate tribunal to settle it, and a petition for rehearing may, if the party desires, keep open the question and save all rights as they may be finally settled by that tribunal.

Per Curiam.—The judgment below is affirmed, with costs, and $\frac{1}{2}$ of 1 per cent. damages.

A. J. Boone, for the appellant.



HOPKINS v. JONES.

MORTGAGES—FORECLOSURE BY STATE—STATUTES CONSTRUED.—The summary foreclosure of school fund mortgages, which were executed to the State prior to 1852, and the sale of the mortgaged property, should be conducted according to the law in force at the time the contract was made.

STATUTORY CONSTRUCTION.—Statutes must be construed prospectively, unless they clearly import a different intention on the part of the legislature.

POWER OF CONGRESS OVER CONTRACTS BETWEEN CITIZENS OF A STATE.—As to the power of Congress to enact laws impairing the obligation of contracts between the citizens of a State, see the opinion at length.

22	310
137	152
22	310
150	445

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APPEAL from the *Madison* Circuit Court.

PERKINS, J.—A mortgage and note were executed as follows:

"We, *Lemuel Kinyon* and *Zelpha Kinyon*, of the county of *Madison*, in the State of *Indiana*, do assign over and transfer to the State of *Indiana*, all the following described pieces of land, to-wit: the east half of the south-east quarter of section 5, in township 21, north of range 8 east, 20 acres in the south-east corner excepted, containing 60 acres, more or less, which we declare to be mortgaged for the payment of 141 dollars and 14 cents, with interest, at the rate of 7 per cent. per annum, payable annually in advance, according to the conditions of the note hereto annexed.

"In testimony whereof we have hereunto set our hands and seals this 24th of *January*, 1848.

"L. KINYON, [SEAL.]

"ZELPHA KINYON, [SEAL.]

"Attest: *Daniel Pickard*."

"I, *Lemuel Kinyon*, promise to pay to the State of *Indiana*, on or before the 24th day of *January*, 1853, the sum of 141 dollars and 14 cents, with interest thereon, at the rate of 7 per cent. per annum, payable annually in advance, commencing on the 24th day of *January*, 1848; and do agree, that in case of failure to pay any installment of interest, the said principal sum shall become due, and collectable, together with all arrears of interest; and on any such failure to pay principal or interest when due, 5 per centum damages on the whole sum shall be collected, with costs, and the premises mortgaged may forthwith be sold by the auditor of *Madison* county for the payment of such principal sum, interest, damages and costs.

L. KINYON."

The mortgage was duly acknowledged and recorded.

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A default in payment of interest, and a sale of the land upon the mortgage, occurred.

When the mortgage and note in question were executed, it is agreed by counsel that the law provided that notice of sale should be given 60 days before a sale of the mortgaged premises should take place, on account of a default of payment of interest, &c., on the mortgage.

Before the sale upon the mortgage took place, a new law had been enacted, touching loans, notes, &c., which provided for notice of sale to be given no more than 21 days before sale, and a notice of 60 days was not given in this case. It is contended that the sale was void, because the notice of sale required by the statute at the date of the mortgage was not given, and this is the only question in the cause.

1. Did the statute, reducing the length of time of notice, impair the obligation of the contract, supposing it operative upon it?

If it did, the statute was void for want of power in the State to enact such a statute.

The inviolability of contracts is most carefully guarded in the *United States*. It is probably a power, admitted to exist in unlimited governments, to impair or abrogate contracts, between the subjects of such governments, by legislation. Hence, the provision in the Constitution of the *United States* that no one of the States composing the Union should enact such a law. Hence, also, as there is no such restriction on the power of the Government of the *United States*, in the Federal Constitution, it may be, though we do not assert the proposition, that Congress might enact a statute of that character, to be operative within the sphere of that government; but such act of Congress, if passed, could not, unless it were a general bankrupt law, operate upon the domestic contracts between citizens of a State; because the jurisdiction of the General Government does not extend, as a general proposi

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tion, to that subject. That power was not ceded to it by the States at the adoption of the Constitution. The prohibition upon the States to exercise it, is a concession that it had not been granted away to the Federal Government. Such an act of Congress could only operate upon contracts executed within the sphere of jurisdiction of the Federal Government; such as contracts in the District of *Columbia*, &c., or between itself and its officers, or contractors, &c. The *United States* is a government over specified subjects and objects, and over persons, as connected therewith, within a certain sphere; and its legislative power extends only to those; and its executive and judicial powers extend *pari passu* with, and, as a general proposition, are bounded by the same limits as the legislative. This follows from the fundamental fact that the Government of the *United States* is one of granted powers, which are circumscribed by the Constitution containing the grant. *Griffin v. Wilcox*, 21 Ind. p. 370, and cases cited; *Warren v. Paul*, and *Thayer v. Hedges*, ante, pp. 276, 282.

Those powers do not extend to the interference with purely domestic contracts between citizens of a State, except through a general bankrupt law. For example, the *United States* could not provide by law that State Courts should not regard as valid any contracts between citizens of a State, unless they were in writing; though Congress may enact a statute of frauds to operate on contracts falling within the jurisdiction of the *United States* Government.

Domestic contracts, then, between the citizens of *Indiana* can not be impaired, except by a bankrupt law, as before mentioned, either by the Government of the State or *United States*; not by the former for want of power, in the abstract, to enact such a law; not by the latter for want of jurisdiction over the subject matter.

The obligations of a contract exist between the parties to it, and may be said to consist in the mutual duties of per-

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forming its requirements. Those obligations might be impaired by the government, if it had the power, in two ways, viz: by expressly abrogating the contract, releasing parties from performance; or, secondly, by depriving the parties of all means to enforce its obligations, or furnishing to them the power and means of enforcing the contract before due, or in a manner variant from its terms.

In the case at bar, if the State has attempted to impair the obligation of the contract, it has done so by expediting its enforcement, after breach by one of the parties, not by allowing it to be enforced before the stipulated time.

What were the obligations of the contract disclosed in this suit? There was an obligation on the side of the creditor to wait till the money, named in the securities appearing in the case, became due, before attempting to enforce its payment; and an obligation on the part of the debtor to pay that money when due, and to permit the land in question to be sold forthwith, if he failed to make the payment.

The contract did not provide for the manner of sale, but an existing statute of the State did. Whether the parties could have prescribed, by contract, a mode different from that prescribed by statute, it is not necessary now to decide, and the authorities upon the point are conflicting. It is true, generally, that what pertains to the *right* between the parties may be regulated by contract, what to the remedy may not, but must be left to the law, though this proposition is true only as applicable to executory stipulations, not to those accompanied by a power of execution, coupled with an interest. But where the line is between the right and the remedy, is not easily defined. See 2 Par. Mar. Law, p. 481-2, notes. For authorities in this State, see *Berry v. Bates*, 2 Blackf. 118; *Low v. Blair*, 6 *id.* 282; *Mendenhall v. Lenwell*, 5 *id.* 125; *The Eagle Ins. Co. v. The Lafayette Ins. Co.*, 9 Ind. 443, and the conflicting cases cited on page 448; *Conrad v. Johnson*, 20

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Ind. 421. In this latter case, it was held that where the agreement of submission to arbitration designates a time, on or before which the award shall be delivered, it must be delivered according to the agreement, though it designates a time at variance with that designated by the statutes in such cases.

We incline to think the statute, mentioned in the first part of this opinion, prescribing the length of time of notice of sale, after default, in cases like that at bar, related to the remedy, though we do not decide the point; and it is settled that the remedy may be altered by the Legislature, if a reasonable one be left remaining. *Scobey v. Gibson*, 17 Ind. 573. And it is further settled, that an act of the legislature, giving a more efficient remedy for the enforcement of the obligation of a contract after breach, does not impair its obligation. *Wood v. Kennedy*, 19 Ind. 68; *Maynes v. Moore*, 16 Ind. 116; *Pierce v. Mills*, 21 Ind. 27. See *Price v. Huey*, at this term. Also, 1 Ind. 456; 2 *id.* 107, 266; 9 Barb. (N. Y.) 482; 1 Hill 324.

2. But we think the act of 1852, shortening the time of notice, not operative, in this particular, on existing contracts. It is a maxim of the law that statutes must be construed prospectively, unless they plainly import a different intention on the part of the legislature. In this case, such intention does not appear by the act of 1852, and that act does not, in terms, apply to existing mortgages. 1 R. S. 439. Shortening the time of notice would curtail a privilege in the matter of time for payment before sale, and is a fact proper to be considered in construing the statute. The time of notice was a right under the statute, so long as it was in force, and it should not be taken away by mere implication. We think sales upon mortgages, executed prior to the act of 1852, should proceed according to the prior law, under section 2 of the general repealing act. 1 G. & H. 585.

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Per Curiam.—The judgment is reversed, with costs. Cause remanded.

McDonald & Roache, for the appellant.

Walter March, for the appellee.

THE TOLEDO AND WABASH RAILROAD CO. v. FOWLER.

PLEADING—PRACTICE.—A complaint against a railroad company for stock killed on the road where it was not fenced, will sufficiently aver the want of fence if it allege "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided," and under such averment, proof may be made that the road had not been duly fenced in at all, or, if it had, that the fence had not been properly maintained.

RAILROADS—FENCES.—The statute requiring railroads to be kept fenced, is not intended to change the common law rule as to the duty of the owner of cattle, nor merely to give them compensation for animals killed or injured on the track where the road is not fenced, but chiefly as a police regulation, for the benefit of the public, to secure safety and freedom from obstructions to the passage of carriages along the track.

SAME.—Where a railroad company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured, before the company has notice, the company is without fault, and not liable for the stock thus killed or injured.

APPEAL from the *Wabash Common Pleas*.

WORDEN, J.—This was an action by *Fowler* against the

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company to recover for stock killed on the road where it was not fenced. The complaint contained four paragraphs, to each of which a demurrer was overruled. The defendant answered in three paragraphs, the first being the general denial, demurrers being sustained to the second and third. Trial, verdict and judgment for the plaintiff.

The appellant claims that error was committed in overruling the demurrers to the several paragraphs of the complaint, because it was not sufficiently averred that the road was not fenced. Each paragraph of the complaint alleged "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided." This allegation seems to us to be sufficient.

The second and third paragraphs of the answer were as follows:

"2. For further answer, the defendant says, that the killing in the several paragraphs of the complaint mentioned, was the result of the carelessness of the said plaintiff himself in leaving the bars, known as *Austin's bars*, open, on the railroad, whereby the horses in question got into the road and were killed.

"3. The defendant further says, that the place where the horses injured, and in the several paragraphs mentioned, got on the railroad track, was what is sometimes called, *Austin's bars*, in the railroad fence erected on land said to belong to *Mrs. Burgett*; that said bars were chiefly used by the plaintiff and *Thomas Austin*; that the bars were frequently left down and thrown down without the consent of the defendant, and against her wishes; that the defendant's section men passed over the road daily to repair, and watched the said bars as closely as possible; that at the times of the several injuries in the different paragraphs mentioned, the horses killed got on the railroad track at said bars before the road (company)

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knew they were down, and before the company had notice and time to repair.”

The statute making railroad companies liable for stock killed upon the road provides that, the act shall not apply to any railroad securely fenced in, and such fence properly maintained by such railroad company. We think the allegation in the complaint that the road was not at the time and place, fenced in by the defendant in manner and form as provided for by the statute, admits of proof that the road had not been duly fenced in at all, or if so, that it had not been properly maintained.

The second paragraph of the answer seems to be defective in not alleging that the road had been securely fenced. The “bars, known as *Austin's* bars,” which the plaintiff left “open, on the railroad,” do not clearly appear to have been in a fence inclosing the railroad. If the pleading had alleged that the defendant had securely fenced the road, and that the plaintiff himself had left down bars in the fence thus made, whereby his horses got upon the track and were killed, it is difficult to see on what ground he could recover.

The third paragraph of the answer seems to be open to the same objection. The allegation in that is that the place, &c., “was at what is sometimes called *Austin's* bars in the railroad fence, erected on land said to belong to *Mrs. Burgett.*” The fence here mentioned is called the railroad fence, but that could hardly be taken as equivalent to an allegation that the road had been securely fenced. Outside of this objection, we think the paragraph in question is good. If the company had securely fenced in her road, and if, as alleged, bars in the fence were thrown and left down, against the consent and wishes of the company, and if the employes of the company passed over the road daily to repair, and watched the said bars as closely as possible, and if the animals were killed before the company, having exercised the diligence above stated,

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had notice that the bars were down, the plaintiff is not entitled to recover.

The common law rule, in the absence of any statute controlling it, is that the owner of cattle is bound to confine them upon his own lands. *Myers v. Dodd*, 9 Ind. 290. The statute in question was not intended to give the owners of cattle the right to depasture them on the ground of railroad companies where the road is not fenced; nor was it intended simply to give them compensation for animals killed or injured on the track where the road is not fenced. It was designed chiefly, as a police regulation, for the benefit of the public, to secure, as far as possible, safety and freedom from obstruction to the passage of carriages along the track. The penalty of not fencing, as was said in the case of *The New Albany and Salem Railroad Co. v. Tilton*, 12 Ind. 3-6, "is the payment to the owner the value of the animal killed. It is, in that respect, better calculated to accomplish the desired end, than a fine paid to the public might be." See cases collected on this point in note 1 to p. 522, 1 G. & H. Safety to the public being the chief design of the statute, it becomes material to inquire what is a proper maintainance of a fence where one has been duly erected. In the case of the same appellant v. *Daniels*, 21 Ind. 256, it was held that where a road had been securely fenced, and the fence destroyed by unavoidable accident, it should be deemed properly maintained, if the company repaired it within a reasonable time after it became insecure. So, we think, where a railroad company has caused its road to be securely fenced in, and has exercised reasonable care and vigilance to see that the fence is duly kept up, and the fence is thrown and left down by third persons without the authority or knowledge of the company, whereby cattle stray upon the track and get killed before the company has notice, the company is without fault; it has discharged its duty to the public, and is not liable, under the statute, for the

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stock thus killed. There is a material difference between the pleading in this case, and that cited from 21 Ind., *supra*. There is an allegation of diligence and vigilance on the part of the company to see that the fence was kept up, viz: "that the defendant's section men passed over the road daily to repair, and watched the said bars as closely as possible." There was no equivalent allegation in the other case.

We have thus expressed our views on these pleadings, because the questions involved will, as we suppose, arise in the further progress of the cause, when they can be amended, if the parties desire to amend. The judgment below will have to be reversed on account of a verbal instruction given to the jury under substantially the same circumstances as in the case of the same appellant against *Daniels, supra*.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

William Z. Stuart, for the appellant.

BERNITZ v. STRATFORD.

CONTRACTS—NOTES—DUE DILIGENCE.—If the maker of a note be not liable to pay it, or if, from his want of means, no part of it could be collected of him by suit, no positive acts of diligence need be performed by the holder.

SAME.—If the maker die a resident of the State in which he lived when the assignment was made, leaving property out of which the note or some part thereof might be collected, his estate, if the maker was liable when living, must be proceeded against before suing the assignor.

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SAME.—If the maker be alive, in the State where he resided when the assignment was made, and be liable on the note, and have any property subject to execution on a judgment against him, he must be sued before the holder can sue the assignor, but if the maker become a non-resident after the assignment, the holder need not follow and sue him out of the State; nor, if he leave property in the State, is the holder required to proceed against it by attachment.

APPEAL from the *Tipton* Circuit Court.

PERKINS, J.—*John McCoy* made his note to *Frederick Bernitz*, and the latter assigned the note to *Isaac W. Stratford* before it fell due. *Stratford* did not sue *McCoy*, the maker, to recover the amount of the note from him, but sued *Bernitz* on his assignment, alleging, as an excuse for failing to sue *McCoy*, the maker, that he had left the State.

Bernitz answered in bar of the action against him, in addition to the general denial, that *McCoy* left property in the State sufficient to pay the note, which property could be reached by attachment. Issue of fact by denial.

On the trial the note, amounting, with interest on it, to a fraction less than 50 dollars, was given in evidence, as was also the assignment upon it; "and it was admitted by the parties that the note was assigned in blank before due; that the maker, at the time the note became due, had become a non-resident of the State, and has ever since remained such, but that, at the time the note became due, and for five months afterwards, the maker had property in the State, at the place where he resided at the time of the assignment, out of which a part of the amount of the note could have been made by a suit in attachment.

On this evidence the Court gave judgment for the plaintiff for the full amount due on the note.

If the second paragraph of the answer was good, the judgment of the Court on the evidence would seem to be erro-

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neous; but we think the second paragraph of the answer was bad, and the final judgment right upon the whole record. The plaintiff below, in this case, had taken a note, not governed by the law-merchant, by assignment before due, and the questions are, had he used due diligence to collect it from the maker before suing the assignor? Or did facts exist excusing diligence? What constitutes due diligence under all states of fact in this class of cases, has not been defined and settled. In most States, where the common law prevails with statutory modifications, demand and notice constitute due diligence. This is a rule capable of certainty. In this State, and some others, due diligence, upon a class of paper, not, in these States, governed by the law-merchant, consists of acts done, varying somewhat with the circumstances of cases; and those circumstances may be such as to exempt the holder from any positive acts of diligence against the maker before resorting to the liability of the assignor.

If the maker be not liable to pay the note; or if, from his want of means, no part of the note can be collected from him by suit, no positive acts of diligence need be performed.

If the maker die a resident of the State in which he lived when the assignment was made, leaving property out of which the note, or some part thereof, might be collected, his estate, the maker having been liable on the note while living, must be proceeded against before suing the assignor; *Dale v. Watson*, 2 Ind. 177, and *Litterer v. Page*, at this term; and if he be alive in the State where he resided when the assignment was made, and be liable on the note, and have any property subject to execution on a judgment against him, he must be sued before the holder can return upon the assignor; but if the maker becomes a non-resident after assignment, due diligence does not require that the holder should pursue the maker out of the State.

Another state of facts might exist. Suit might be brought

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against the maker; property enough be levied on to pay the debt, and be wasted by the sheriff; might the holder then go back upon the assignor, or would he have to pursue the sheriff on his bond? We make no answer to this question. See *The State v. Druly*, 3 Ind. 431, and case cited; *Cheek v. Morton*, 2 Ind. 321. In the case at bar, the maker had become a non-resident after the assignment, and this fact excused a suit against him personally; but he left property in the State that might have been reached by attachment; was the holder bound to resort to that proceeding before suing the assignor?

Our conclusion is that he was not. That can not be regarded as one of the ordinary proceedings at law. It can not be resorted to without giving a bond to pay damages, &c., and is thus attended with liabilities which might involve the party in loss which he could not hold the assignor responsible over to him for, in case the attachment should turn out to be wrongful. We do not think the holder is, as a matter of course, to incur this hazard. Whether a state of facts might exist that would make it the duty of the holder, in a given case, to take out an attachment, we do not decide.

Nor do we now approve or disapprove of the case of *Cheek v. Morton*, *supra*, but suggest the inquiry whether the union, in our present practice, of equitable with legal remedies may not work a modification of the rule as to pursuing some equitable interests before resorting to the assignor.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Moss & Lewis, for the appellant.

George W. Lowley and N. R. Lindsay, for the appellee.

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DUNN v. CROCKER.

ATTACHMENT—PRACTICE—WAIVER.—Where the defendant appears in attachment suits the regularity of the attachment proceedings must be tried in such suits; and if the defendant, having appeared, makes no objection by motion or answer, their regularity will be deemed admitted, and all objections waived.

ATTACHMENT—PRACTICE.—Objections to the regularity of attachment proceedings can not be first raised in collateral suits.

SAME—JUSTICES' COURTS.—The practice in attachment proceedings is the same in justices' as in the superior Courts.

UNDERTAKING IN ATTACHMENT.—As to what undertaking in attachment proceedings will operate to release the attached property and authorize a personal judgment, see the opinion at length.

ATTACHMENT—REPLEVIN—AFFIDAVIT.—In either of these forms of action, the affidavit may contain the requisites both of a complaint and affidavit, so as to dispense with any separate complaint.

PLEADING.—In an action upon an undertaking in attachment, it is necessary to set out the undertaking and show that a case arose in which it was properly taken, but the proceedings in attachment need not be fully set out or made part of the complaint. They are not the foundation of the action.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—The record in this case shows that on the 3d of *August*, 1860, *Luther Crocker* commenced a suit before a justice of the peace against *Martin D. Bonney*, upon a note on which there was due a fraction less than 100 dollars. The suit was commenced by attachment against the personal property of *Bonney*. On the same day personal property of *Bonney* was seized by virtue of the attachment. On the 7th of *August*, 1860, *Bonney* executed and filed with the justice an undertaking, as follows:

“We, the undersigned, undertake that the property attached in said cause shall be delivered to the constable on demand,

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or so much thereof as shall be required to be sold on execution to satisfy any judgment which may be rendered against him in said action; or will pay the appraised value of said property, not exceeding the amount of the judgment and costs.

"Witness our hands and seals, this 7th day of *August*, 1860.

"MARTIN D. BONNEY.

"ISAAC D. DUNN."

The justice approved the undertaking and the attached property was released. The defendant, *Bonney*, then obtained a continuance of the cause until the 18th of *August*, 1860, on which day he obtained a further continuance to the 25th of that month, on which day there was a further continuance to the 27th of the same month.

The Court refused to sustain motions to dismiss, to quash the attachment, &c.; the cause was tried, the trial resulting in a personal judgment against the defendant for the amount due on the note, &c. Execution issued on the judgment, property was not delivered to satisfy it, the property attached having been removed to the State of *Ohio* after it was released upon the undertaking filed with the justice.

No appeal was taken from any part of the judgment before the justice.

On the 5th of *April*, 1862, *Crocker* commenced suit upon the undertaking of *Bonney* and *Dunn* above set out, and in the *Wayne* Circuit Court obtained judgment upon it against *Dunn*, the defendant, served with process, from which judgment *Dunn* appealed to this Court.

The burden of the defence below, in this suit, was that the attachment proceedings were not legally conducted, and, hence, there was not a valid consideration for the instrument now sued on; and that is the question into which all others resolve themselves on the appeal to this Court. Our present

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attachment law is much broader than was our former attachment law. It authorizes such a proceeding against resident defendants, in specified cases; and thus brings into existence a great number of causes where the defendant actually appears to the attachment suit. Where the defendant does so appear, the question of the regularity of the attachment proceedings must be tried in the attachment suit. *McNamara v. Ellis*, 14 Ind. 516.

If, in that suit, the defendant, having appeared, raises no objection to those proceedings by motion or answer, their regularity is admitted, or objection to their irregularity is waived, and such objection can not be, for the first time, brought forward in a collateral suit. And the practice, in attachment cases, is the same in justices and in superior Courts. *Bradley v. The Bank, &c.*, 20 Ind. 528; 2 G. & H. 150; *Hosier v. Eliason*, 14 Ind. 523.

That irregularities in attachment proceedings may be waived, not only by not objecting to them in Court, but also, by act of the party out of Court, is well settled. *Drake on Attachment*, 2d ed., §§ 193, 195. And under our statute, the wife, if acting as the agent of her husband, might undoubtedly make the waiver. 1 G. & H. p. 377, at bottom. See, also, *Casteel v. Casteel*, 8 Blackf. 240.

The way is now prepared for stating, and, with more conciseness, deciding the material points made in the case at bar.

The action is founded upon the written instrument executed to procure a release of the attached property.

It is not clear, from the terms of the instrument, under what section of the statute it was executed; whether under 2 G. & H. p. 143, sec. 168, or, same page, sec. 172. The first of these two sections provides for an undertaking in the nature of a delivery bond, which does not release the property from the attachment, nor from an order of sale in the judgment. It is taken and approved by the sheriff. The second

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of the sections is as follows: "If the defendant, or other person in his behalf, at any time before judgment, shall execute a written undertaking to the plaintiff, with sufficient surety, to be approved by the Court, clerk or sheriff, to the effect that the defendant will appear to the action, and will perform the judgment of the Court, the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof."

Interpreting the instrument by the circumstances of the case and the acts of the parties, we think it was intended to operate under section 172. *Bonney* was about removing the goods with his family to *Ohio*. His wife remained temporarily behind with the goods, and when they were attached waived the calling in of householders, &c. *Bonney* returned, executed the instrument in question before the justice by whom it was approved, and the goods were released and removed to *Ohio*. *Bonney* appeared personally to the suit, made defence, and judgment was rendered personally against him, without any order in the judgment for the sale of the attached property. This is the practice to be pursued under section 172. Under that section the written undertaking is a substituted security for the property, and where the attachment proceedings are sustained and judgment is rendered against the defendant, no order is made for the sale of the property, it having been released, but a suit on the undertaking is resorted to instead of the property. It is like the attachment proceedings against water craft. It is true, the written instrument is informal; but it was taken by a public officer, and bonds thus taken in proper cases, are not vitiated by informalities and defects. 2 G. & H. p. 333, sec. 790; *Ward v. Buell*, 18 Ind. 104.

The point is made that there was not a sufficient complaint in the attachment suit before the justice. Though this point became and remains *res adjudicata*, by the judgment of the

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justice, unappealed from or otherwise vacated, still it may be stated that it has always been the law that in attachment and replevin suits the affidavit might contain the requisites both of a complaint and an affidavit. *Harlow v. Becktle*, 1 Blackf., 2d ed., 287; *Andre v. Johnson*, 6 *id.* 188; *Erwin v. Shaw*, *id.* 287.

We come now to the question, what was necessary, in suing on the written undertaking, to be shown in the complaint? The suit is founded on that written undertaking. It was executed under a statute. Hence, it was necessary to set out the written undertaking, and show that a case arose in which it might be taken. But in averring the facts showing that case, it might not be necessary to set out written instruments or copies of them, because the statute only requires this, in all cases, as to instruments which are the foundation of the action. Hence, by the general rule, that statutes in derogation of the common law, are to be strictly construed; pleadings, where the statute has not prescribed differently, may be as at common law. In this case the averments, outside of the judgment of the Court in the attachment suit, were sufficient to show a proper case for the execution of the written undertaking. But it was probably unnecessary to have gone behind that. *Macy v. Titcomb*, 19 Ind. 135. See *Byers v. The State*, *fc.*, 20 Ind. 47. See note b, 2 G. & H. 143.

We see no substantial ground on which the judgment can be reversed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages, and costs.

W. A. Bickle and *C. H. Burchenal*, for the appellant.

Geo. Holland and *H. B. Payne*, for the appellees.

Harris v. Mercer.

HARRIS v. MERCER.

CONTRACTS—SALE—FRAUD.—Where there has been a sale, and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor.

PRACTICE—AMENDMENT.—In an action to recover personal property and damages for the detention thereof, it is not competent for the Court, in the progress of the trial, over the objection of the defendant, to permit the plaintiff to amend his complaint so as to claim special damages for expenses incurred in money and time in seeking to recover such property.

APPEAL from the *Delaware* Circuit Court.

HANNA, J.—The appellee sued the appellant to recover certain personal property, to-wit: Nine reaping and mowing machines, and damages for their detention; averring that he was the owner and entitled to the possession thereof. Answer. 1. Denial. 2. That the property came lawfully to the possession of the defendant and had not been demanded, &c. 3. The machines were and are the property of one *Patterson*, and not of the plaintiff. Reply in denial; and that the property did not belong to *Patterson*, because, he professed to derive title through one *Duncan*, who obtained said property of said plaintiff feloniously, viz: by false pretences—said plaintiff being the original owner and manufacturer thereof. To this paragraph of the reply, a demurrer was overruled; which presents the first point for our consideration. It is urged as one objection, that the pleading is not good because the false pretences should have been specifically stated and set forth. We need not stop to determine as to this particular objection to the reply; for the reason that, substantially, the pleading

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was invalid, under ruling in the case of *Bell v. Cafferty*, 21 Ind. 411.

The evidence is not all in the record. It appears by the bill of exceptions that two notes purporting to have been made by one *Howard* to said *Duncan* and endorsed by the latter, together with a paper purporting to have been executed by said *Duncan*, in which he gave the age, residence and pecuniary standing of said *Howard*, as well as his own, and showed that he gave said two notes to plaintiff for reapers and mowers, were offered by plaintiff and admitted in evidence. The defendant objected, because the execution of said writings, &c., was not proved, nor notice given that they would be offered as evidence.

The plaintiff himself testified as to the execution of the writing, but there was a subscribing witness thereto who was not introduced.

As the whole evidence is not in the record, we must presume a sufficient foundation for the admission of said testimony was laid, although it is shown, that foundation was not established by proving the execution of said writings. Suppose the notes never had been executed by *Howard*, but were a forgery, and that proof to that effect was before the Court. Of course in such an instance proof of the execution thereof would not come from that quarter, but exactly to the reverse—that is, the non-execution.

During the progress of the trial, the complaint, which was for the recovery of the property and damages for the detention thereof, was so amended as to claim special damages—that is, damages for expenses incurred, in money and time, in seeking to recover said property. This amendment was permitted, to meet evidence upon these points. The amendment was objected to—but no continuance asked because thereof. The jury were not resworn, nor any further pleadings filed or offered, nor any motion to strike said amendment out.

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There was an agreement that the demurrer before then filed to the complaint should apply to the same as then amended. We are rather inclined to think that the ruling of the Court in permitting the amendment, over the objection of defendant, was error, in this case. It may be that in cases, where the action is directly for damages, and the amendment is only in the nature of specifications as to the same, it should be admitted; or in cases where such amendment does not claim substantially beyond what might be recovered under the original allegations in the complaint.

The evidence of the special damages claimed was objected to, but admitted. It consisted of personal expenses of plaintiff and his clerk, amount paid for horse hire, and items as to the value of the time of the two persons named. It appears to us this evidence was clearly inadmissible, as tending to prove damages that were too remote.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Walter March, for the appellant.

J. Brownlee, for the appellee.

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PRACTICE IN SUPREME COURT—AFFIDAVIT.—An affidavit for a continuance is no part of the record, unless made so by a bill of exceptions, or an order of the Court under section 559 of the code.

SAME.—Where a bill of exceptions does not contain a copy of the matter excepted to, or a direction to insert it, it will be defective; but if the bill, as filed here, contain the matter excepted to, this Court will presume that it was written out in the bill as originally filed in the Court below, or that the bill contained the proper direc-

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tion to insert it, and if the bill, as originally filed, contained the proper direction to insert it, it would probably be sufficient for the clerk, in making up the record for this Court, to refer to it as copied into another part of the transcript.

APPEAL from the *Shelby* Circuit Court.

WORDEN, J.—The appellant was indicted for burglary, and, upon trial, was convicted.

He appeals, and claims that error was committed in refusing a continuance of the cause on his application. The affidavit, on which the continuance was asked, can not, as we think, be regarded as in the record; hence, the question sought to be presented is not properly before us. It is settled, in numerous cases, that an affidavit for a continuance is no part of the record, unless made so by a bill of exceptions, or an order of the Court under section 559 of the code of civil practice.

In this case, the clerk has set out, in one part of the transcript, an affidavit, evidently made for the purpose of procuring a continuance of the cause. The bill of exceptions, in respect to this point, is as follows: "Be it further remembered, that the defendant then and there moved the Court to continue said cause, and in support thereof filed the following affidavit, to-wit: (see affidavit above set out,) but the Court overruled the motion, to which," &c.

The code of practice in criminal cases provides that the exception must be taken at the time the decision excepted to is made; that the bill of exceptions must be made out, signed and filed during the term, and that it must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken. 2 G. & H. 420, sec. 120-1.

In the code of civil practice, we have the following provision: "It shall not be necessary to copy a written instrument, or any documentary evidence, into a bill of exceptions; but

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it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words, 'here insert.' " 2 G. & H. p. 209, sec. 348. The bill of exceptions in question is clearly defective, if tested by the provisions of the criminal code only. That code makes no provision for leaving documents out of a bill of exceptions, referring to them with direction to "here insert" them.

It has, however, been held, that though the provisions of the civil code do not necessarily govern in criminal practice, yet that it is reasonable to consult them in the absence of special provisions in the criminal code, in establishing rules, &c. *M'Laughlin v. The State*, 8 Ind. 281; *Quinn v. The State*, 14 Ind. 589.

Taking it for granted that the provision of the civil code, above quoted, should be applied to the case, we proceed to state why we deem the bill of exceptions defective under that. The bill neither contains the affidavit, nor any direction to insert it. If the bill, as it came up to us, had contained the affidavit, it would have been presumed that the affidavit had been written out in the bill, as originally filed in the Court below, or that the bill contained the proper direction to insert it. And if the bill of exceptions had shown the proper direction to insert the affidavit, we are not prepared to say that, in making out a transcript for this Court, a reference to it by the clerk, as copied in another part of the transcript, might not be sufficient. The difficulty here is, that the affidavit is not made a part of the bill of exceptions by the Court, either in causing it to be set out in the bill as originally filed, or in directing that it be inserted.

Per Curiam.—The judgment is affirmed, with costs.

McDonald & Roache, for the appellant.

Oscar B. Hord, Attorney General, and *Martin M. Ray*, for the State.

Newby v. Hinshaw.

NEWBY v. HINSHAW.

WIDOW—DESCENT—STATUTES CONSTRUED—SPECIFIC PERFORMANCE.—Where a widow, as the heir of her husband, becomes the owner in fee, of real estate, under the provisions of sections 17 and 18 of the act regulating descents, whilst she remains his widow, she has the legal right to alienate such real estate, and such alienation will convey a perfect and absolute title, and if she sell by title bond, and put the purchaser in possession, and then marry again, she may, after such marriage, be compelled to specifically perform such contract by conveying the legal estate.

APPEAL from the *Henry* Circuit Court.

PERKINS, J.—*William B. Albertson* died seized in fee of certain real estate, leaving *Rebecca Albertson*, his widow, and children, by her surviving. Afterwards, on the 22d day of *October*, 1863, said *Rebecca*, sold by title-bond, one third of the real estate of which said *William*, her husband, died seized, to *Albert Newby*, receiving in hand a part of the purchase money, and placing said *Newby* in possession.

Subsequently, and before receiving the balance of the purchase-money and executing a deed, said *Rebecca* married one *Elijah Hinshaw*. If said *Rebecca* was contemplating marriage at the time she sold the land in question, *Newby*, the purchaser, was ignorant of that fact.

The question is, whether said *Rebecca* can now, after having become the wife of said *Elijah*, receive the balance of the purchase-money and execute a deed to said *Albert Newby*. The Court below so held, and ordered the contract to be specifically performed.

Our law of descent enacts:

“SEC. 24. If a man die, intestate, leaving a widow and a child or children not exceeding two, the personal property of such intestate shall be equally divided among the widow and children, the widow taking an equal share with one

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child, but if the number of children exceeds two, the widow's share shall not be reduced below one-third of the whole: *Provided*, that if a man marry a second or other subsequent wife, and has, by her, no children, but has children alive, by a previous wife, the land which, at his death, descends to such wife, shall at her death, descend to his children."

If, in the case at bar, then, *Rebecca Albertson* was the second and childless wife of *William B. Albertson*, and he left surviving him children by a former wife, she had, under the section of the statute quoted, but a life estate, and, if she had no more, the purchaser could obtain no larger estate from her. But the record does not show a case under this section; and if it exists it is the fault of the parties that it is not shown to exist.

The law of descent further provides:

"SEC. 19. If a husband die, testate or intestate, leaving a widow, and if the entire estate, real and personal, do not exceed 300 dollars, it shall go without administration to the widow, free from all demands of creditors, in trust for herself and the infant children of the deceased, while they remain infants or unmarried, with remainder over to the widow, and if there shall be no such children, she shall take the whole: *Provided*, that if the widow shall marry while any of such children remain infants and unmarried, the husband shall, within ten days after such marriage, execute his bond, payable to the State of *Indiana*, in a sufficient penalty, and with security to the approval of the clerk of the proper Court of Common Pleas, conditioned for the true and faithful application of such property, or so much thereof as the widow may have at the time of the marriage, to the benefit of such children, and in default thereof, the title to such property shall vest absolutely in such children.

"SEC. 20. If a husband die, testate or intestate, and his estate, real and personal, exceed 300 dollars, and be insol-

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vent, or if, after payment of all his debts, less than 300 dollars would remain, then, and in either of these cases, 300 dollars of the same shall go to the widow, free from all demands of creditors, for herself, or in trust, as in the preceding section provided."

Both the foregoing sections are so framed as to conform to the principles of justice, as to preserve the property of a deceased husband for his children after the estate for life, the period of necessary use of the wife has ended; but the case at bar is not shown by the record to fall within any of them.

There are further sections of the law of descent:

"SEC. 17. If a husband die, testate or intestate, leaving a widow, one third of his real estate shall descend to her in fee simple, free from all demands of creditors: *Provided however*, that where the real estate exceeds in value 10,000 dollars, the widow shall have one fourth only, and where the real estate exceeds 20,000 dollars, one fifth only as against creditors.

"SEC. 18. If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage, in virtue of which such real estate came to her, if any there be."

So far as shown by the record, the property in question came to *Mrs. Albertson* under these sections. See 1 G. & H. 294, for the law of descent, and for notes of cases arising under it. Also, *Philpot v. Webb*, 20 Ind. p. 509; *Blackleash v. Harvey*, 14 Ind. 564; and *Barnes v. Allen*, 9 Am. L. Reg. 747.

If *Mrs. Albertson*, now *Mrs. Hinshaw*, acquired the land sold to *Newby* under the sections last quoted, she became the fee-simple owner, with a restriction on her power to sell, during her coverture, but at no other period. This is the plain language of the statute. And while by its terms, the

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statute is not adequate to accomplish what would seem, by its general tenor, to have been the legislative intention, and what would seem to be justice, still its language is so explicit, so free from ambiguity, that we think we are not authorized to give it a different operation, by construction. It must go to the legislature for amendment. As it now is, it practically amounts to no restraint upon alienation, as the case before us demonstrates. The fee-simple goes absolutely to the widow. The owner of the fee can alienate it, unless the power to do so is withheld. *Cox's Adm'r. v. Wood*, 20 Ind. 54. That power was not withheld, so far as appears, in this case, at the time the sale was made. By the sale, as made in this case, the purchaser became the equitable owner, and the vender the trustee for the purchaser. As such, we think she was rightly held vested with the power, and liable to be compelled, to execute the trust.

Per Curiam.—The judgment is affirmed, with costs.

T. B. Redding, for the appellant.

Brown & Polk, for the appellees.

LITTERER v. PAGE.

PROMISSORY NOTES—DUE DILIGENCE.—Where the maker of a note dies before its maturity, and the note is then duly filed as a claim against his estate, and then his administrator resigns and no other is appointed, due diligence requires that the claimant on the note, in order to retain the liability of the assignor, should apply for the appointment of another administrator, or institute an action against the heirs of the estate and procure an order subjecting the property inherited by them to the payment of the note.

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APPEAL from the *Jefferson* Common Pleas.

DAVISON, J.—This was an action by the indorsee of a promissory note, not payable in bank, against the indorser. The appellant was the plaintiff, and the appellee the defendant. The note is for the payment of 300 dollars; bears date *September 6th, 1856*; was executed by one *Coffin O. Page*, and is payable at twelve months to the defendant, who, by indorsement, assigned it to the plaintiff.

The complaint alleges these facts: *Coffin O. Page*, the maker of the note, died before its maturity, viz: on the 14th of *July, 1857*, in *Jefferson* county; the widow and heirs of the deceased were, at his death, and at all times since have been, residents of said county; on *November 24th, 1857*, one *James H. Cunningham* was, by the Common Pleas Court of the county aforesaid, duly appointed administrator of the decedent's estate, and as such was duly qualified; on the 18th of *September, 1858*, the plaintiff, with the proper affidavit thereto attached, filed the note against the estate, which was duly allowed by the administrator; after this, on the 11th of *November*, then next following, *Cunningham* was, on his own petition, discharged by the Court from the further administration of the estate, and, on the 10th of *February, 1859*, one *William G. Wharton* was appointed administrator, who, on the 15th of *August* then next ensuing, procured an order for the sale of the real property belonging to said estate, and afterwards sold the same to one *Michael G. Garber*; that sale was, by the administrator, reported to the Court, was approved, and a deed was ordered to be made to the purchaser; but *Garber* having failed and being unable to pay the purchase money, the sale was, upon the application of the administrator, set aside. It is averred that the order of sale is still in force, but the administrator was unable to sell; that on *December 31st, 1861*, he was, on his own petition, discharged from the further administration of the estate, and that since

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the 31st of *December* aforesaid, no letters of administration upon the estate have been taken; that the plaintiff, at the decedent's death, was, and at all times since has been, a non-resident of this State; but has continuously urged the settlement of said estate, and has not been in default in her endeavors to collect therefrom the note in suit; and that *Cunningham* and *Wharton* have fully administered upon the personality that came to their hands. Wherefore, &c. Demurrer to the complaint sustained, and final judgment for the defendant.

Are the facts alleged in the complaint sufficient to authorize a suit against the assignor of the note? This is the only question to settle.

In cases of this sort the assignee, in order to recover, is required to use due diligence against the maker, if in life when the note matures, if he is not, then against his estate, unless a legal excuse for not using it can be shown. The doctrine is that the property, subject to the payment of the debts of the maker, must be exhausted before recourse can be had to the assignor. *Hardesty v. Kenworthy*, 8 Blackf. 304. Here, the maker died before the note became due, and we are at once led to inquire whether the assignee has used due diligence to collect the note from the estate of the decedent. With the proper affidavit thereto attached, she filed the note against the estate, which was allowed by *Cunningham*, the then administrator, who, having resigned the trust, *Wharton* was appointed in his stead. The former was administrator about one year, and the latter, having procured an order and made a sufficient effort to sell the real estate, was, upon his own petition, discharged from the further administration of the estate. Until the resignation of *Wharton* the plaintiff, it may be conceded, was not chargeable with any want of diligence. But, upon his resignation, she made no effort for the appointment of a successor, and we must pre-

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sume, if a proper application had been made to the Court or clerk, by any creditor, that an administrator would have been appointed. There is, however, another reason why the plaintiff can not be held to have used due diligence. She had a right, though there was no administrator, to file her complaint against the heirs of the estate, and procure an order subjecting the property which they inherited from the decedent to the payment of the note. *Bryer v. Chase*, 8 Blackf. 508, and cases there cited; *Dale v. Watson*, 2 Ind. 177; *Philpot v. Webb*, 20 Ind. 510. True, if there be an administrator, he may be compelled to settle the estate; but where, as in this case, there is none, the plaintiff is plainly entitled to a remedy against the heirs of the maker of the note. We think that, in this case, the plaintiff has failed to use such diligence in the collection of the note, as the law requires, and the result is, the demurrer was well taken.

Per Curiam.—The judgment is affirmed, with costs.

C. E. Walker and *A. D. Matthews*, for the appellant.

Jeremiah Sullivan, for the appellee.

HARRINGTON v. FINNEY.

CONTRACT—RESCISSION OF.—Where *A* sells and conveys land to *B*, and the deed, before it is duly recorded, is lost, and *A* then sells and conveys the same land to *C*, who has full notice of the former sale and conveyance to *B*, the title in *B* is no way impaired, and the conveyance to *C*, under the circumstances, is a nullity, and gives no right to *B* to rescind or recover back the purchase money paid to *A*.

APPEAL from the *Wayne Circuit Court*.

Harrington v. Finney.

DAVISON, J.—The appellees were the plaintiffs, and the appellant the defendant. The facts alleged in the complaint are as follows:

In *August*, 1861, the defendant for a valuable consideration, viz: 1,200 dollars, conveyed to the plaintiffs, by a general warranty deed, a tract of land (describing it) in *Green* county, and State of *Iowa*. The deed was properly acknowledged and delivered. In *October* next ensuing the execution of the deed the plaintiffs enclosed it in an envelop, directed to the recorder of said county for the purpose of having the same properly recorded, and placed the same in the post office at *Cambridge City*, *Wayne* county, *Indiana*. It is averred that the plaintiffs paid a valuable consideration for the lands. The deed never was received by the recorder; never was recorded, and the same was and is lost, of which they, the plaintiffs, duly notified the defendant, and that he also ascertained the facts that the deed was not recorded by corresponding with said recorder; that the defendant, having knowledge that the deed was lost and not recorded, did, in *June*, 1861, with intent to cheat, defraud and injure the plaintiffs, sell and by deed in fee convey the same land to his brother, one *Timothy Harrington*, a resident of *Ohio*, which last mentioned deed has been duly forwarded to the proper recorder, and duly recorded in said county of *Green*; that, by reason of the premises, the plaintiffs' title is rendered worthless and of no value, and that they have lost the aforesaid real estate which was and is of the value of 1200 dollars. Damages are laid at 1200 dollars.

Defendant demurred to the complaint; but the demurrer was overruled. And thereupon he answered—1. By a denial. 2. By a set-off. Verdict in favor of the plaintiffs for 680 dollars; new trial refused, and judgment, &c.

The causes assigned for a new trial are to the effect that the verdict is not sustained by the evidence.

During the progress of the trial the defendant was exam-

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ined as a witness. He testified thus: "The plaintiffs are indebted to me 205 dollars, a security debt, which I was liable for and have paid. I sold the land to *Timothy Harrington*, but I did not intend to defraud any one. I only wanted to get my own. My object was to save the money which I paid as their surety. When I sold the land to *Timothy Harrington* I notified him that I had before conveyed it to the plaintiffs. I told him I had paid the security debt for them and could not get it. I got from my brother, the said *Timothy* 200 dollars, for the land, in part payment of a debt I owed him. I told him that the land I was selling him was the same land I had sold the plaintiffs, and I sold it to him as the same land." This was, in substance, all the evidence upon the point of the subsequent purchaser having notice of the prior conveyance to the plaintiffs. We think it conclusively proves such notice, and that being the case, the deed to the second vendee was a nullity; the title to the land remained in the plaintiffs, and was in them when this action was commenced. The mere facts, that the plaintiffs' deed has been lost, and is not recorded, do not, in any degree, affect the validity of the title, and the result is they are not entitled to recover the purchase money. The evidence, in our judgment, does not sustain the verdict, and hence a new trial should have been granted.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Develin & Johnson, and *Peelle & Wilson*, for the appellant.
N. H. Johnson and *W. S. Ballinger*, for the appellee.

Holland v. The State.

HOLLAND v. THE STATE.

CRIMINAL LAW AND PRACTICE.—Where the facts, which are necessary to give the Court of Common Pleas jurisdiction to try a felony, appear upon the information, it is not necessary that they should also appear upon the order book or in the judgment of the Court.

APPEAL from the *Dubois* Common Pleas.

Per Curiam.—This was a prosecution for grand larceny. The information alleges “that on the 19th of *March*, 1863, at the county of *Dubois*, one *George W. Holland* did feloniously steal, &c., one iron gray horse, of the value of 75 dollars, of the goods and chattels of *Wesley Nicholson*, contrary, &c.; and that he, *George W. Holland*, is now in the custody of the sheriff, and confined in the jail of said county upon said charge of grand larceny, he not having been indicted by a grand jury for said crime.

Plea, not guilty; verdict against the defendant, upon which the Court rendered judgment.

In this case there was no motion for a new trial or in arrest, nor does the record contain a bill of exceptions, or any exception in any form, to the rulings of the lower Court.

There is, however, a point made in reference to the jurisdiction of the Common Pleas, which it is proper to notice. The appellant says it is not enough that the information on its face shows the defendant to have been in custody and not indicted, but these facts should appear affirmatively on the order book or in the judgment of the Court. We think differently. If the facts which gave jurisdiction appear in the information, it will be sufficient. Here they are sufficiently alleged in the information, and the result is, the jurisdiction of the Court must be sustained.

The judgment is affirmed, with costs.

J. W. Burton, for the appellant.

Oscar B. Hord, Attorney General, for the State.

Jenkinson v. Bowen.

JENKINSON v. BOWEN.

PLEADING—SET OFF.—Where the maker of a note, in an action upon it by an assignee against him, pleads, that, at the time of the indorsement of the note by the payee to the plaintiff, the payee was indebted to him, &c., such averment will sufficiently show that the indebtedness accrued before notice of the assignment of the note.

APPEAL from the *Allen* Common Pleas.

WORDEN, J.—This was an action by *Bowen* against *Jenkinson*, upon two promissory notes, the one made by the defendant to the plaintiff, and the other made by the defendant to one *Joseph S. France*, and indorsed by the latter to the plaintiff. Judgment for the plaintiff for the amount of both notes.

The defendant pleaded, as to the latter note, by way of set off, that at the time of the indorsement of the note by *France* to the plaintiff, *France* was indebted to the defendant in an amount, which was stated, greater than the amount of the note. A demurrer was sustained to this paragraph of the answer, and exception taken.

No brief having been filed by the appellee, we are not advised upon what ground the pleading was supposed to be bad.

It is said by counsel for the appellant, that it was held bad because it did not allege that the indebtedness accrued before notice of the assignment. The statute provides that "whatever defence or set off the maker of any such instrument had, before notice of assignment, against an assignor, or against the original payee, he shall also have against their assignees." 2 G. & H. 658. It is alleged that the indebtedness in question existed at the time of the assignment, and this must have been before the defendant had notice of such assignment. We see no substantial objection to the pleading, and are of opinion that the demurrer should have been overruled.

Per Curiam.—The judgment below is reversed, with costs. *Jenkinson, Morris & Case*, for the appellant.

Behler v. The State.

BEHLER v. THE STATE.

CRIMINAL LAW AND PRACTICE.—In a criminal case the record on appeal to this Court needs not to set forth the steps preliminary to the impanneling, swearing and charging of the grand jury.

SAME.—As to the right of a defendant in a criminal case, who has pleaded guilty, to have a jury called to assess his punishment, see the opinion at length.

APPEAL from the *Elkhart* Circuit Court.

WORDEN, J.—Indictment for retailing liquor without license. Plea of guilty, fine by the Court of 5 dollars, and judgment. Motions to quash, and, in arrest, were overruled.

The first objection made, is that the record does not show the impanneling of a grand jury, or the return of the indictment into Court by that body. An amended transcript sent up on *certiorari* shows these facts. It is also objected that the record does not show that the grand jury were duly sworn. The amended transcript shows that the grand jury "were duly sworn and charged by the Court."

But it is objected that the record does not show the certificate of the auditor containing the names of the grand jurors drawn by the board of commissioners, nor that it was recorded by the clerk on the order book, as provided for by section 6 of the act providing for the selection of grand jurors, &c., 2 G. & H. 482, nor that the pannel was filled according to section 10 of said act.

The record shows that the sheriff, in pursuance of a *venire facias* theretofore issued to him, brought into Court twelve persons, naming them, to serve as grand jurors, who were duly sworn and charged by the Court, &c., and that they afterwards returned into Court the indictment in question.

The 11th section of the act above cited, provides that "no plea in abatement, or other objection, shall be taken to any grand jury duly charged and sworn, for any alleged irregu-

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larity in their selection, unless such irregularity, in the opinion of the Court, amounts to corruption, in which case such plea or objection shall be received."

By this section, it will be seen that no objection can be taken to the grand jury, duly charged and sworn, on account of any irregularity in their selection, in the absence of corruption; and for this reason, it seems to us clear, that the record need not set forth the steps preliminary to the impanneling, swearing and charging of the grand jury. If an irregularity, amounting to corruption, be charged by the defendant, he should show it by plea or otherwise.

But it is claimed that the defendant was entitled to have a jury impaneled to assess the amount of his punishment. The Court fixed the lowest amount of punishment, prescribed by law for the offence, of which the defendant pleaded guilty, and we can not see that a jury could have dealt more leniently with him. We shall not decide whether a defendant, who has pleaded guilty to a charge of felony or misdemeanor, would be entitled to have a jury to assess the punishment. In this case, the defendant waived that right, if the law would have given it to him. The fine was assessed by the Court without any objection being made, or exception taken in that respect. One of the reasons urged in arrest, was "that the Court had no authority to make a finding in the cause upon a plea of guilty, the cause not having been submitted to the Court for trial." Unless this language can be construed into an objection to the fine being assessed by the Court, no such objection was made, either at the time the fine was assessed, or afterwards.

The objection here urged being purely technical, as applied to this case, we are not inclined to extend the meaning of the language employed at all beyond its legitimate import. The Court made no finding in the cause. The objection did not go to the fixing of the amount of punishment, the defend-

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ant's guilt having been admitted by plea, and there being no finding necessary to the fixing of the punishment.

Per Curiam.—The judgment is affirmed, with costs.

W. A. Woods, for the appellant.

Oscar B. Hord, Attorney General, for the State.

33	347
137	17
138	347
138	311
22	347
135	308
136	30

HARDIN v. THE STATE.

CRIMINAL LAW AND PRACTICE—ABATEMENT.—A defendant is not allowed, in criminal cases, to plead in abatement that another indictment is pending against him for the same offense.

SAME.—Where a person is not under prosecution for an offence, but is still indicted therefor, he may plead in abatement of the indictment the disqualification of any of the grand jurors who found it.

SAME.—Pleas in abatement in criminal cases should neither be uncertain, ambiguous nor repugnant.

SAME.—No issue can be made by plea in abatement in criminal cases upon the fact whether grand jurors by whom an indictment was found were reputable or not.

APPEAL from the *Clark* Circuit Court.

WORDEN, J.—*Hardin*, the appellant, was indicted in the Court below, for the murder of *Peter Yesley*, and upon trial, was convicted of the offense and sentenced to be hanged.

Before pleading in bar, the defendant pleaded in abatement five several pleas, as follows:

1. Comes now *Henry Hardin* in person, &c., and saith he is the defendant in a criminal prosecution now pending in this Court, wherein he is charged by indictment with the crime of murder, and that he ought not to be tried upon the same for the reason that before the indictment was found

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against him, to-wit: at the *October* term of the *Clark* Circuit Court, 1863, he was indicted in that Court for the identical offence charged in the present indictment, and on his petition the venue in that behalf was changed to the *Jackson* Circuit Court: that the parties to this action and the former prosecution are the same, and the former indictment and prosecution are still pending against him; wherefore, &c.

2. And the said defendant for further answer saith that he ought not to be tried upon said indictment for the reason that the persons by whom the indictment was found were not legal grand jurors; not having been selected according to law, in this: that the board of commissioners of the county of *Clark*, at its *March* term, 1864, that being the first regular session of said board for said year, did not select the names of sixty persons having the requisite qualifications for grand jurors, from the tax duplicate of the county of *Clark* for the preceding year, or cause to be written their names upon separate ballots, and placed in a box prepared for that purpose; wherefore, &c.

3. And said defendant for further answer saith that, he ought not to be tried upon said indictment, for the reason that the persons by whom the indictment was found, were not legal grand jurors, not having been selected according to law, in this: that they were not reputable freeholders or householders of the county of *Clark*, and taxable therein; wherefore, &c.

4. And said defendant for further answer to said indictment, saith he ought not to be tried upon the same, for the reason that the persons by whom the indictment was found were not legal grand jurors, not having been selected according to law, in this: that the Clerk of the *Clark* Circuit Court, did not, in the presence of the board of commissioners of *Clark* county, at its *March* term, 1864, that being the first regular session in said year, draw by lot from the names of

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sixty persons having the requisite qualifications for grand jurors, who had been selected by the board of county commissioners, the names of the persons who found the said indictment, to act as grand jurors, for this term of this Court; wherefore, &c.

5. And said defendant for a further answer to said indictment, saith that, he ought not to be tried upon the same, for the reason that the persons by whom the same was found were not legal grand jurors, not having been selected according to law, in this: that said persons were not selected by the judge of this Court, to serve as grand jurors for this Court, at this term; wherefore, &c.

These several pleas were verified. Demurrers were sustained to each of these pleas, and exception taken. The correctness of the ruling on these demurrers raises the only question in the record.

The first plea was clearly bad, and the demurrer was properly sustained. A defendant is not allowed in criminal cases, as in civil actions, to plead in abatement that another indictment is pending against him for the same offense. 1st Arch. Crim. Plead., Waterman's notes, 858; *Commonwealth v. Drew*, 8 Cush. 279; *Dutton v. The State*, 5 Ind. 533.

The second, fourth and fifth pleas, may be considered together. They go to the manner of the selection of the grand jury, and do not, in view of the provisions of our statute, set up any valid matter of abatement.

The act to limit the number of grand jurors, &c., 2 G. & H. 431, provides the manner in which grand jurors shall be selected by the board of commissioners, and Clerk of the Circuit Court, but those provisions need not here be set out in order to an understanding of the points here decided. The following sections, however, on which the questions arising in the case depend, may be set out in full:

"SEC. 1. Be it enacted, &c., that a grand jury shall con-

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sist of twelve members, all of whom shall be reputable freeholders or householders of the proper county, and taxable therein.

"SEC. 10. A panel of grand jurors may be filled in whole or in part, when necessary, by summoning the requisite number of freeholders or householders of the proper county, under the direction of the Court, who shall, in the discretion of the Court, be selected from persons residing in the several townships, unless in consequence of delay in filling the panel, or for other satisfactory reasons, the Court shall otherwise direct.

"SEC. 11. No challenge to the array of any grand jury shall be allowed, unless such challenge shall be supported by affidavit setting forth the cause therefor.

"SEC. 12. No plea in abatement, or other objection shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the Court, amounts to corruption, in which case such plea or objection shall be received."

Under the provisions of the section last above quoted, where a grand jury has been duly charged and sworn, as was done in the present case, it is not material in what manner they may have been selected to serve as such, unless the irregularity of their selection amounts to corruption.

Nothing charged in the several pleas now under consideration; amounts to corruption; and, indeed, no corruption is claimed to have existed.

But, aside from this, the pleas in question are each radically bad on other grounds. Each plea must be good by itself. Neither one of these pleas, taken by itself, shows that the grand jury was not selected strictly according to law. Neither the second, nor fourth shows but that it was selected under the direction of the Court, as provided for in the 10th section of the statute above quoted. The fifth does not show but

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that it was duly selected by the board of commissioners and Clerk as provided for by law.

We come to the third plea. From the language of this plea, it is uncertain whether it should be treated as going to the manner of selecting the grand jury, or to the qualification of the jurors. It says that those who found the indictment, "were not legal grand jurors, not having been selected according to law, in this: that they were not reputable freeholders or householders of the county of Clark, and taxable therein."

It alleges that they had not been selected according to law, and gives as the particular in which they had not been thus selected, the personal disqualification of the jurors; a thing that has nothing to do with the manner of their selection, but only with their capacity to serve. Pleas in abatement should neither be uncertain, ambiguous nor repugnant. But we pass over this uncertainty, and proceed with the plea as if it set up matter going to the disqualification of the grand jurors, rather than to the manner of their selection. A question arises whether such objection can be taken by plea in abatement?

A challenge to the array of a grand jury, we have seen by the statute, may be made, if supported by affidavit, and no doubt challenges to the polls may be made where any of the jurors have not the necessary qualifications. These challenges, however, must be made before the jury are sworn and charged. And where a person is under prosecution for an indictable offence, whether in custody or on bail, it would perhaps devolve no hardship upon him to require that he should take his objection to the grand jury about to inquire into the offence with which he is charged, or any member thereof, by way of challenge, and not permit him to forego the challenge and afterwards set up the objection by plea in abatement. But where a person is not under prosecution for

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an offence, he cannot be supposed to anticipate that a charge may be made against him before the grand jury, and in such case we think he may plead in abatement of the indictment, the disqualification of any of the grand jurors who found it. *The State v. Herndon*, 5 Blackf. 75; 1 Whart. Am. Crim. Law, sec. 472; 1 Arch. Waterman's notes, p. 359. In the case before us, it does not appear that the defendant was under prosecution before the indictment was found.

We return to the plea in question; and we think it was bad, and the demurrer properly sustained, for reasons which will be stated. The strictness and certainty required at common law in pleas in abatement, obtained in criminal prosecutions, as well as in civil cases. *The State v. Newer*, 7 Blackf. 307; *The State v. Willis*, 11 Humph. 222; *Findley v. The People*, 1 Manning (Mich.) 234. If our code of civil practice has made any alteration in respect to pleading in abatement in civil cases it does not apply to criminal cases. The code of criminal practice furnishes its own rules, and it provides that, "the laws and usages of this State, relative to pleading and practice, in criminal actions, not inconsistent herewith, as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." 2 G. & H. 428, sec. 172.

Tested by the ordinary rules that apply to pleading of this description, the plea is liable to two objections that are fatal:

First, it seeks to make an issue on matter that is not issuable. It alleges that the jurors "were not reputable freeholders or householders of the county of *Clark*, and taxable therein." But for aught that appears by the plea, the jurors were "freeholders or householders of the county of *Clark*, and taxable therein." Whether they were reputable persons or not was a matter to be judged of by the persons selecting the grand jury; and, in our opinion, an issue could not be made upon this matter in order to determine the validity or

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invalidity of the indictment. A certain standard by which to determine who are, and who are not, "reputable," can not easily be found. It fluctuates more or less with every shade of opinion that may be entertained by the community, upon the subjects of religion, morals and politics; and a man who, by one jury or set of triers, might be thought to be highly reputable, might, by another, be thought to be exceedingly shabby. For an analogous case, see *The State v. McGinley*, 4 Ind. 7-11.

But, secondly, if we regard the plea as alleging simply that the jurors "were not freeholders or householders of the county of *Clark*, and taxable therein," it is too vague and uncertain as to the particular disqualification intended to be relied upon. There are three elements that go to make up the qualifications of the jurors in question: first, they must have been either freeholders or householders; second, they must have been of the county of *Clark*; third, they must have been taxable in that county. Now the plea in question does not allege that the jurors did not have any of these qualifications, but that they did not have all of them; which particular ones were lacking was not specified. If the plea had alleged that the jurors were not freeholders or householders, nor of the county of *Clark*, nor taxable in that county, it would have negatived all the necessary qualifications, at least all that could have been inquired into, and in that case further particularity would seem to be unnecessary. But the plea alleges that they "were not freeholders or householders of the county of *Clark* and taxable therein." This allegation would be true, if they were freeholders or householders, but not of the county of *Clark*, or, if of the county of *Clark*, not taxable in that county. It would also be true if they were of the county of *Clark* and taxable therein, but not freeholders or householders. The plea, in short, negatifies some of the necessary qualifications, but not all; and it

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fails to specify which the jurors possessed, or which they lacked.

The pleading may be, and probably is, liable to further objection, but we deem it unnecessary to pursue the subject further.

Per Curiam.—The judgment below is affirmed.

Jason B. Brown, for the appellant.

Oscar B. Hord, Attorney General, *Thomas M. Brown* and *Martin M. Ray*, for the State.



 BARNER v. MOREHEAD.

PRACTICE—DEMURRER—PLEADING.—A demurrer to three paragraphs of an answer in these words: "Said plaintiff comes and demurs to the first, second and third paragraphs of the defendant's answer, and each of them, for the following grounds of exception, viz: that said paragraphs of defendant's answer do not state facts sufficient to constitute a defence," should be treated as joint, and not several, and if any one of the answers so demurred to was good the demurrer should be overruled.

PLEADING—CONSIDERATION.—An answer to an action upon a note that the note was given without any consideration whatever is good.

APPEAL from the *Boone* Common Pleas.

PERKINS, J.—This was a suit upon two promissory notes made by *Morehead*, the defendant, payable to one *Carter*, receiver, &c., and his successors in office. *Barner* claims to be a successor. The complaint did not contain the appointment of *Barner*, as receiver, and we doubt whether it was not defective for that reason, not because the appointment was the

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foundation of the action, but of the power to sue. Perhaps that power, in such case, should be shown. The note was not payable to *Barner*, nor was it assigned to him. See *Heron v. Vance*, 17 Ind. 595; *The Ohio, &c. Co. v. Fitch*, 20 id. 498. The defendant answered in four paragraphs. To three of these paragraphs the plaintiff demurred thus:

"Said plaintiff comes and demurs to the first, second and third paragraphs of defendants' answer, and each of them, for the following grounds of exception, viz: that said paragraphs of defendant's answer do not state facts sufficient to constitute a defence."

The Court overruled the demurrer; the plaintiff excepted generally, and then replied, generally, in denial of the three paragraphs. The cause was tried by the Court. There was final judgment for the defendant.

The demurrer to the paragraphs of the answer was treated, below, as joint to all the paragraphs, without objection by counsel; and we think that construction might be put upon it. Indeed, counsel on both sides so treat it in this Court. Ambiguity may be turned against the party employing it. This being so, if there was one good paragraph, the demurrer was rightly overruled. *Talbott v. Armstrong*, 14 Ind. 254. One of the paragraphs was that the notes were given without any consideration whatever. This was good. A general answer of no consideration is valid. *Frybarger v. Cockefair*, 17 Ind. 404; *Swope v. Fair*, 18 Ind. 300.

Per Curiam.—The judgment below is affirmed, with costs.

Tipton, McDonald & Boone, for the appellant.

James N. Sims, for the appellee.

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THE STATE *ex rel.* PRATT v. ROUNDS.APPEAL from the *Ripley* Circuit Court.

Per Curiam.—This was a suit upon an executors' bond for wrongfully and corruptly, as is averred, selling at a reduced price certain lands, for the sale of which he had obtained an order from the Common Pleas Court. On the trial the Court excluded all the evidence offered by the plaintiff on the ground, we are informed by the brief, that the proceedings, shown to have taken place previous to and upon the order of sale of said lands, were of such a character as did not divest the title of said relators in said lands, and therefore no injury resulted to them. An amended record sent up upon a *certiorari*, awarded by this Court, presents the parties as before that Court, and appears to make a case in which the order of sale, &c., were not void. The ruling will therefore have to be reversed.

The judgment is reversed, with costs.

Oscar B. Hord, Cortez Ewing and John K. Thompson, for the appellants.

A. C. Downey and John K. Cravens, for the appellee.

THOMAS v. FEASTER.APPEAL from the *Rush* Circuit Court.

Per Curiam.—The appellant sued the appellee to recover certain real estate, to which his pleadings showed he claimed title by virtue of a judgment, execution, sheriff's sale, and deed. It appears the judgment was recorded in *January*,

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1859, in the Common Pleas Court, upon confession, on warrant of attorney, for 1100 dollars.

At that term the Common Pleas had no jurisdiction to render judgment for more than a 1000 dollars. The demurrer to the complaint should have been sustained. *Marsh et al. v. Sherman*, 12 Ind. 358; *Shaw v. Gallagher*, 8 *id.* 252; *Armstrong v. Jackson*, 1 Blackf. 210.

The judgment is affirmed, with costs.

A. W. Hubbard, Geo. C. Clark, and L. & W. O. Sexton, for the appellant.

J. S. Scobey, for the appellee.

TILLSON v. CRIM.

PLEADING—NEW TRIAL.—Where a new trial is prayed for on the ground of causes discovered after the term at which the verdict or judgment was rendered, the complaint should clearly show that such causes were discovered after such term, or it will be bad on demurrer.

APPEAL from the *Madison* Circuit Court.

PERKINS, J.—Complaint for a new trial, filed after the term at which a trial was had.

The grounds for a new trial are, surprise at the trial and newly discovered evidence. The complaint was demurred to, the demurrer was sustained, and the complaint dismissed.

The statute provides that, "where causes for a new trial are discovered after the term at which the verdict or decision was rendered," &c.

If the causes are discovered during the term, the motion for a new trial must be made during the term; and where

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the application for a new trial is made after the term the complaint must show that the causes were discovered after the term or it will be bad on demurrer. 2 G. & H. p. 215, and note.

In the case at bar, the complaint alleged "that since the trial of said cause the plaintiff has ascertained," &c., but has no allegation that the discovery was made since or after the term, &c.

The decision below is right, and is affirmed with costs.

Per Curiam.—The judgment is affirmed accordingly.

H. Craven, W. R. Pierce and H. D. Thompson, for the appellant.

John Davis, for the appellee.

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PLEADING—NEW TRIAL.—Where an application for a new trial is made after the term, based upon newly discovered evidence, there must be brought to the knowledge of the Court, by affidavits or otherwise, the issues in the cause, the evidence adduced upon the former trial, and the newly discovered evidence, in order that the Court may correctly determine its duty in the premises.

APPEAL from the *Rush* Common Pleas.

Per Curiam.—This was an application by the appellant under section 356, p. 215, 2 G. & H., for a new trial within a year after judgment. The application is based on newly discovered evidence. The complaint for the new trial does not profess to contain all the evidence given on the former trial, not even all upon the points upon which the new trial is sought. A demurrer was, for this reason, properly sustained

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to said complaint. *Cox v. Hutchings*, 21 Ind. p. 219; *Glide-well v. Daggy*, *id.* 95.

The judgment is affirmed, with costs.

Claypool, Clarke, McDonald & Roache, for the appellant.

Hendricks & Hord, for the appellee.

BROWN'S ADM'R v. SULLIVAN.

ADMINISTRATOR DE SON TORT.—Mere acts of kindness and charity, touching the property of a deceased person, such as taking care of it, feeding stock, providing for children, &c., will not constitute the person who does them an administrator *de son tort*.

COSTS.—In an action against a person as administrator *de son tort*, if the plaintiff recover 5 dollars or more in damages, he will be entitled to judgment for costs generally.

APPEAL from the *Washington Common Pleas*.

PERKINS, J.—*Elisha Tarr*, as administrator of the estate of *William Brown*, deceased, sued *David Sullivan*, as executor *de son tort* of said *Brown's* estate, laying his damages at 200 dollars. *Sullivan* answered in two paragraphs.

1. The general denial.

"2. Said defendant for further answer to said complaint says, that he took possession of said property at the request of his daughter, who was the widow of said decedent, merely for the purpose of taking care of the same, and that he took proper care thereof, doing it no injury, until letters of administration were taken out on said estate, when he delivered up said property to the plaintiff, the administrator appointed, so soon as he was authorized to receive the same, which is the taking and conversion complained of in the complaint.

"**JOHN H. BUTLER**, for defendant."

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The Court overruled a demurrer to this answer. A reply in denial was then filed. Trial, judgment for the plaintiff for less than 50, but more than 5 dollars. Judgment for costs in favor of the defendant.

It is claimed that the Court committed two errors:

1. In overruling the demurrer to the second paragraph of the answer.

2. In rendering judgment for costs against the plaintiff.

We will notice these two points in their order.

Who, then, is an executor *de son tort*? Our statute declares that:

"SEC. 15. Every person who shall unlawfully intermeddle with any of the property of a decedent, shall be chargeable as an executor of his own wrong, and shall be liable to an action in the Court of Common Pleas, or any other Court of competent jurisdiction, by any creditor or other person interested in the estate of the decedent, to the extent of the damages occasioned thereby, and shall account for the full value of such property, with 10 per centum thereon, and may be examined under oath touching such intermeddling, and testimony thus elicited shall not be thereafter used against him in any prosecution; and such person may also be attached and imprisoned in the discretion of the Court, until its orders in the premises are complied with; and no debt due such executor from the decedent shall be deducted from the value of any such property." 2 G. & H. 488.

The intermeddling, then, with the goods of a deceased, by a living person, which will constitute such living person an executor *de son tort*, must be an illegal intermeddling. Was the intermeddling set forth in the second paragraph of the answer a legal or illegal one? Fifteen days must elapse, and a greater number may, before an administrator of an estate can be appointed; 2 G. & H. 485; who is to take care of the estate of the deceased in the meantime? Will the taking

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care of it constitute a person an executor *de son tort*? Toller says: "But there are many acts which a stranger may perform without incurring the hazard of such an executorship; such as looking up the goods; directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself or out of the deceased's effects; making an inventory of his property; advancing money to pay his debts or legacies; feeding his cattle; repairing his houses; providing necessaries for his children; for these are offices of kindness and charity." Tol. on Ex. p. 40. Acts of kindness and charity, then, may be performed without subjecting the person to the liability of an executor *de son tort*.

According to the second paragraph of the answer, nothing beyond such acts was done in this case. We think the ruling on the demurrer was right. See *Reagan v. Long's Adm'r*, 21 Ind. 264.

We think the judgment for cost against the plaintiff was wrong, irrespective of the question whether the Common Pleas had jurisdiction of the cause by virtue of its character as a Probate Court. The action sounded *in tort* only, was for damages solely, and the plaintiff recovered over 5 dollars. See 2 G. & H. p. 227, § 398.

The judgment as to costs is reversed with costs, with instructions to render judgment below against the defendant for costs; the judgment against the defendant is affirmed, subject to correction as to costs as above directed.

Per Curiam.—The judgment is accordingly reversed as to costs, and affirmed as to the residue.

Horace Heffren, for the appellant.

John H. Butler for the appellee.

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CULBERTSON v. MILHOLLIN.

CONSTABLE'S SALES.—Where the record of a constable's sale is silent as to whether due notice was given of the sale or not, the Court will presume that the constable did his duty.

SAME.—EXECUTION ON JUSTICE'S JUDGMENT.—Where a constable levies upon property to satisfy an execution from a justice's Court, and advertises it for sale, but fails to sell, and returns the writ, with his proceedings indorsed thereon, and the justice issues another execution, and fails to append to it a copy of the return made to the first, his failure so to do will not render the second execution void, but only voidable, and it might be set aside on motion before the justice, but if no such motion was made, all acts done under it will be valid.

APPEAL from the *Delaware* Common Pleas.

DAVISON, J.—This was replevin, by the appellee, who was the plaintiff, against *Culbertson*, commenced before a justice of the peace, for the recovery of a dun colt. The plaintiff claimed title, under a constable's sale, by virtue of an execution, issued upon a judgment, in which he was plaintiff, and *Culbertson* was defendant. The justice gave judgment in favor of the plaintiff for 25 dollars, and the defendant appealed.

In the Common Pleas the issues were tried by the Court, who found for the plaintiff 30 dollars. Motion for a new trial overruled and judgment.

The evidence shows that *Milhollin*, the present plaintiff, on *January* 28, 1860, recovered a judgment against *Culbertson*, before a justice of the peace, for 3 dollars and 88 cents, and that on the 3d of *July*, then next following, an execution was thereon issued, upon which the constable, on the 1st of *January*, 1861, made a return as follows:

"This writ came to hand *July* 3, 1860. By virtue of said writ, I levied on one shovel plow and one cane mill, and offered

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the same for sale on *July* 14th, 1860, and there was no sale for want of bidders. Service, 25 cents; mileage, 70 cents; advertising, 30 cents; return 10 cents; the whole 1 dollar and 85 cents. HENSON LINES, Constable."

After this, on *January* 4th, 1861, another execution was issued on said judgment, upon which the constable made the the following return:

"This writ came to hand *January* 17, 1861. By virtue of this writ, I levied on one dun colt. Advertised for sale *February* 1, 1861; offered for sale *February* 11, 1861, and sold to *Nathan Milhollen* for 9 dollars and 60 cents.

"HENSON LINES, Constable."

The evidence further shows that the plaintiff, upon the service of the first execution, gave up the plow and cane mill to the constable, who levied on, advertised and offered the same for sale, and there being no sale for want of bidders, he left the property on the premises of the defendant, where it has remained near his residence ever since. It also appears, that when the colt was levied on, the defendant was absent from home, and that at the time of the last levy, the plow and cane mill were both on the defendant's premises, of which the constable was notified.

The appellant contends, that there being in the record no evidence that the requisite notice of the sale of the property was given by the constable, the sale was invalid. This position is untenable. The record being silent as to whether the constable did or not advertise the sale, he will be presumed to have done his duty. *Mercer v. Doe*, 6 Ind. 80.

Again, it is insisted, that the second execution—the justice having failed to append to it a copy of the return made on the first—was a nullity. The statute required the justice to

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append such copy. 2 R. S. (G. & H.) p. 602, sec. 80. But his failure, in this instance, to do so, rendered the execution voidable merely, but not void. And being thus voidable, might have been set aside on motion before the justice; but no such motion having been made, "all acts done under it are valid." *Doe v. Dutton*, 2 Ind. 309.

Various other points, relative to the rulings of the Court, are made by the appellant. These we do not deem it material to notice; because, in looking into the whole record, we are of opinion that the finding and judgment are right on the evidence. 2 R. S. (G. & H.) p. 122, sec. 101.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Walter March, for the appellant.

C. E. Shipley and *A. Kilgore*, for the appellee.

THE GERMAN MUTUAL FIRE INSURANCE CO. v. FRANCK.

MUTUAL INSURANCE COMPANY—PREMIUM NOTES—CONTRACTS.—It is competent for a Mutual Fire Insurance Company, organized under the laws of this State, to provide in its articles of association, or by its by-laws, that all premium notes shall be paid in installments as ordered by the directors, after notice, and that if not so paid, the entire notes shall become due and collectable.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—The act for the organization of Mutual Fire Insurance Companies, in this State, contains this section:

"SEC. 45. Every person who shall become a member of such company, shall, before he receives his policy, deposit his

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promissory note as a premium note, for such sum as may be agreed upon, on which note he shall pay not less than five per cent. immediately upon its delivery, and the balance of such note shall be payable in part or in whole, when, on any assessment made, the directors shall require the same." 1 G. & H. p. 395.

The law fixes no time or times at which assessments must be made. Assessments are left to the discretion of the directors upon the necessities of the company.

Section 46 of the same act, provides for the investment of the funds that may be on hand from time to time, and section 47 requires a statement of the condition of the treasury and the loss occurring, before an assessment may be made. One clause of the articles of association of the company is this:

"5. If the funds on hand are not sufficient for the payment of the loss, the directors shall lay an assessment on the members in proportion to the amount of their premium notes. The treasurer shall notify the members of each assessment, and it is their duty to pay the same within thirty days after such notice. If any member refuses or neglects to pay such assessment, the directors may bring suit for and collect the whole amount of said premium note, or the directors may cancel the policy of such member, and collect the assessment due up to the time of such assessment. The amount thus collected shall remain in the treasury of the company for the satisfaction of further assessments; but at the expiration of the period for which such negligent member has been insured, he shall be entitled to demand and receive the return of any balance which may be left after the payment of the costs of suit and his share of all losses and expenses."

The following premium note was executed to the company:

"\$180.00. In consideration of policy, No. 193, dated the 26th day of April, 1860, issued by the German Mutual Fire

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Insurance Company of *Indiana*, we promise to pay the said company, or the treasurer thereof, the sum of 180 dollars, either in whole or in part, and at such times as the directors of said company, in accordance with their statutes, may direct, without any relief whatever from valuation or appraisement laws.
J. P. FRANCK & Co."

An assessment was regularly made of ten per centum, on the premium note, the defendant failed to pay in the required time, and this suit was commenced for the whole amount of the note.

The Court below held that the whole amount could not be recovered because it was not in the power of the corporation to require payment on the premium notes beyond the assessments severally made to meet losses; and this is the only question in the cause.

Blackstone, book 1, p. 476, says, it is a power incidental to a corporation "to make by-laws or private statutes for the better government of the corporation; which are binding upon themselves unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation; for as natural reason is given to the natural body for the governing of it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at *Rome*."

Now, it is laid down in Angel and Ames on Corporations, sec. 842, in speaking of corporation by-laws, thus:

"It should be observed, that what may be bad as a by-law, as against common right, may be good as a contract; since a man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or, perhaps, knowledge, by those

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who might not know or would not consider his individual interests. Hence, it would be found that a by-law may be void as against strangers, or member● who do not assent to it, and yet good as a contract between members of the corporation who do assent to it." 13 Mass. 282; 8 Met. 321; 17 Ves. 323.

And in sec. 360, the same authors say:

"A power reserved by by-law to the directors of a Mutual Insurance Company, in case of a non-payment of a call on a premium note, given by a member of the corporation, to require payment of the whole amount of the note to be held for the payment of assessments due and thereafter made, the balance, if any, to be returned to the member after the expiration of his policy, is not a power to impose a forfeiture, and requires no express authorization by charter."

And *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) Rep. 124; and *Beadle v. The Chenango ꝑc. Co.*, 3 Hill, (N. Y.) Rep. 164, are cited as in point.

Then, if the item we have copied, in the first part of this opinion, from the articles of association of the appellant Insurance Company, had been a prospective by-law, this case would have furnished an exact parallel to the case from Douglass, *supra*, where such a by-law was held to govern contracts made under it. An individual may stipulate that, if he fails to pay an installment of a debt when due, such failure shall cause other installments to become due.

If such would be the effect of a by-law, existing at the time of making a contract with the company, much more would it be the effect of an item in the articles of association of the corporation itself of which, every person who receives a policy from it, becomes a member. Sec. 44, p. 395, 2 G. & H.

We do not think the provision in the articles of association involved in this case an unreasonable one, nor contrary to the law of the land.

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To prevent any misapprehension, we may remark that, we do not hold that, in a case where there was no provision in the articles of association corresponding with that in those of the appellant, nor by-law of like import, at the time the policy was taken out, the company could, by a retroactive by-law or provision in the articles, impose conditions upon policies issued. Corporations can not, as a general proposition, by virtue of their incidental power to create by-laws, enact penalties, or conditions beyond the statutes. See Grant on Corporations, p. 76 *et seq.*, where this point is fully discussed.

The case at bar rests in contract, a contract not forbidden by law to be made.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

Thomas L. Smith and Michael C. Kerr, for the appellant.

Alexander Dowling, for the appellees.

NAVE'S ADM'R v. WILLIAMS.

EVIDENCE—WITNESS—COLOR.—It is the duty of the Court to determine the competency of witnesses, and where the objection to the competency of the witness rests upon the allegation that he has such an amount of negro blood as disqualifies him to testify, the Court may, upon inspection, determine *prima facie* his competency, but if his blood be not sufficiently apparent for such mode of determination, then the Court may examine other witnesses, either to prove the blood of the witness from reputation amongst those who knew him, or to establish the character of his blood by the testimony of experts.

APPEAL from the *Fountain* Circuit Court.

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HANNA, J.—This was a suit against the appellees for breaking and entering the close of one *Nave*, now deceased, and carrying away certain property, to-wit: cow, &c. Answers in denial.

There are three points made:

1. On the ruling suppressing parts of depositions.
2. For refusing to suppress other depositions.
3. In refusing instruction asked by plaintiff.

The trial resulted in a judgment for the defendants.

It appears that the depositions of two persons named *Williams* had been taken by the defendants and were on file. The plaintiff took the depositions of two witnesses named *Kernodle*. The questions propounded to these latter were intended to ascertain whether said persons, by the name of *Williams*, were of mixed blood. One of the witnesses testified that such was the "report" in the neighborhood. The other that he had "heard him called negro *John* and had heard one man say his father was half negro, and from his looks and what I am informed he is about one-fourth negro." It is shown that this evidence was directed to *Williams*, the elder, and the other was his son. Was it admissible?

We have not been referred to any authority upon the point involved, and in the limited time and number of books at our command have not been able to find the question as fully treated as we could have desired.

This does not fall strictly within the principle upon which pedigree is sometimes established. A man of mixed blood, or having that appearance, might be offered as a witness, whose pedigree was not known at all by any persons within the jurisdiction of the Court, so that evidence of his descent could not be produced. Under our practice the Court determines the question of competency. We suppose, perhaps, in a case where the blood of the witness is manifest, the Court, upon inspection, might determine *prima facie* that he was

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not competent. If the correctness of the determination were doubtful, evidence might be heard. But of what character?

In *Gentry v. Polly McMinnis*, 3 Dana (Ky.) 390, it was held, in an action by her to test the question of her freedom or slavery, "that inspection by the jury was proper, and that if, after such inspection, they should, upon a consideration of all the facts before them," &c. Here the question was not left to mere inspection alone, but was taken together with other matters for consideration. Those other matters were evidence as to whether she was born in *Pennsylvania* after the act of 1780, and of the length of time she had been in service. In *Chancellor v. Milly*, 9 Dana 24, *Milly*, upon an issue whether she was entitled to her freedom or not, was exhibited to the jury for their inspection, and was apparently a white woman about forty years old. To rebut the presumption arising from such inspection, *Chancellor* offered to prove "that in the family in which she was born and reared from infancy she had ever been called and reputed the child of a woman of color." The evidence was refused. The Court of Appeals reversed the decision, and say: "After the lapse of forty years such a fact would scarcely ever be susceptible of any other proof than that of reputation. And we perceive no reason why it should not be admissible in a suit for freedom as well as in all other suits where proof of pedigree becomes material. * * Such reputation would have been admissible in *Milly's* favor, if her reputed mother had been free," &c. In the case of *Hudgins v. Wights*, 1 H. & M. (Vir.) 139, which was a similar suit to those above referred to, it had been proved, "that the people in the neighborhood said that if she would try for her freedom she would get it." The Court remarks that, "this general reputation and opinion of the neighborhood is certainly entitled to some credit; it goes to repel the idea that the given female ancestor of *Hannah*

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was a lawful slave," &c. See, also, to the same effect, *Bryan v. Walton*, 20 Geo. 480. In the same case it is said that, "it may sometimes be necessary for a judge to decide upon his own view." An instance is given where three persons are brought before a judge, the one black, with a flat nose and woolly head; the next copper colored, with long, jet black, straight hair; the other fair complexion, brown hair, not inclined to wool, with a prominent Roman nose. There is no evidence but that of the eyes of the judge; that is, he sees them, inspects them, derives information through his own sense of sight, and not of hearing, as if another should examine them and testify. What should he do? Surely he could do nothing but declare the first a negro, the second an Indian, and the third a white man, and let them take their positions accordingly, under the laws of the country. But if the blood of the different races had been, for generations, so mixed as to remove, to a great extent, the distinguishing mark of color, and to a lesser extent that of the flat nose and the wool, instead of hair; which mark remains, perhaps, the longest, and is the last to be eradicated; what should the judge do then? Examine the person offered as a witness, hear direct proof, if it can be had, of his birth and of his ancestors. If, because of the lapse of time, or from other sufficient reason, such proof can not be produced, then, we suppose, reputation may be resorted to. And, although we have seen no case to that effect, why could not the lights of science be brought to bear upon the doubtful question by the evidence of adepts, men of skill in this, as in any other physiological fact? It is true, such evidence, in either instance, should have more or less weight as it should directly or remotely bear upon the fact to be established to the satisfaction of the judge.

With this view of the question, the ruling of the Court would appear to be erroneous in suppressing parts of the

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depositions that were suppressed. Perhaps a part of the last answer should have been stricken out. As to the effect of the ruling it is difficult to determine. If that was all the evidence that the party intended to present to the Court upon the question of the competency of the two *Williamses*, as witnesses, we are not prepared to say that it should have controlled the Court in excluding their evidence, and as there was no offer to introduce other or additional evidence upon that point, we can not presume he was prepared to offer such.

As the ruling of the Court in refusing to suppress depositions was upon a motion based upon the assumption that the witnesses, to-wit: these *Williamses*, were of mixed blood, and the plaintiff a white man, of course it follows that the Court did not, after the first ruling, do wrong in the second, for there was, then, no evidence before the Court of their incompetency because of such mixture.

The legal proposition sought to be impressed upon the jury by the instruction refused, was that a tenant holding farming lands, under his landlord, could not, without the consent of such landlord, sell his interest in the crop to a third person, and substitute such third person in the place of said tenant to gather said crop, &c. We think the Court ruled correctly in refusing this instruction. There was not, so far as shown, any prohibition against underletting, &c.

Per Curiam.—The judgment is affirmed, with costs.

John M. Larue, for the appellant.

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JURISDICTION—HABEAS CORPUS—CLERK.—The act of *January 3, 1852*, (2 G. & H. 304,) giving jurisdiction to the Clerk of the Circuit Courts to issue writs of *habeas corpus*, and to hear and determine them, is, by the subsequent legislation on the subject of *habeas corpus*, repealed, and such clerks have now no such power.

HABEAS CORPUS—PETITION FOR.—Where a guardian desires, by the aid of a writ of *habeas corpus*, to obtain the custody of his ward, he must make his letters of guardianship a part of his petition for the writ.

APPEAL, from the Clerk of the *Franklin* Circuit Court.

PERKINS, J.—*Habeas corpus* issued by, and heard before, the Clerk of the *Franklin* Circuit Court, on behalf of one *Joseph H. Wynn*, claiming to be the guardian of *Oscar G. Wynn*, an infant, against *Israel Gregg*, who, it is alleged, wrongfully held in custody the said *Oscar*.

By the judgment of the Clerk, the custody of *Oscar* was awarded to *Joseph H. Wynn*. The first question made is upon the jurisdiction of the Clerk to issue the writ and hear the cause.

By the act, approved *January 3, 1852*, 2 G. & H. p. 304, the preamble to which recites that in consequence of the abrogation of the office of associate judge, &c., those entitled to the writ of *habeas corpus* may be put to great trouble and inconvenience in being brought before the judges of the Circuit Courts, at places remote, &c., it is enacted that the Clerks of the Circuit Courts, &c., may issue writs of *habeas corpus*, hear the causes, &c. A later statute authorizes the several Courts, &c., to issue the writs, &c., but does not purport to repeal the act authorizing the Clerk to issue, &c.; 2 G. & H. 818; and perhaps the legislature might confer that power on that officer. See *Waldo v. Wallace*, 12 Ind. 569. We think, however, considering the reason assigned in the preamble of the

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act conferring the jurisdiction upon Clerks, and the fact of the subsequent creation of the Court of Common Pleas, and also the later statutes on the subject of *habeas corpus* generally, that it was the intention to supersede the jurisdiction of Clerks of the Court to issue of their own volition and hear writs of *habeas corpus*, and that such Clerks do not now possess such power.

But this is a point we need not have decided, because the complaint, in which the writ was prayed, does not contain facts authorizing the issue of a writ of *habeas corpus*, and hence the order below must be reversed.

No letters of guardianship, or copies thereof, appear in the complaint, or even in the record. Hence, no authority on the part of *Wynn* to claim the custody of young *Oscar* is shown. See *Warren v. Hofer*, 13 Ind. 167. At common law, in its earlier stages, profert, in pleading, was made of deeds, records, probates, letters of administration, &c., but not of unsealed private writings; Steph. on Pl. p. 69; and copies were furnished on demand. Under the code, in *Indiana*, we have gone back to the earlier common law, and beyond it, in requiring copies, or the originals of all these instruments, records, &c., to be filed with the pleading relying on them. In this case the letters of guardianship constituted the authority of the plaintiff below to apply for the writ. He should have produced that authority, or a copy of it, and filed it with his complaint. The point was properly saved by demurrer and exception.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

John M. Johnston, for the appellant.

S. A. Bonner, for the appellee.

Hollensbe v. Thomas.

HOLLENSBE v. THOMAS.

APPEAL BOND—CONTRACT.—Where an appeal is prayed from the judgment of a justice of the peace, within the time limited by law, and a bond signed by the surety but not by the principal, is filed and approved by the justice, the appellant is entitled to his appeal, and the subsequent withdrawal of the bond to procure its execution by the principal, and its absence from the files until after the expiration of the time limited for an appeal, could not divest the party's right to the appeal.

APPEAL from the *Riply* Common Pleas.

HANNA J.—*Thomas* sued *Edward* and *John Hollensbe* before a justice, and had judgment on the 16th day of *February*, 1863. On the 14th of *March*, following, the agent of said *Hollensbes* filed an appeal bond, signed by one *Clark*, and prayed an appeal, which was granted and the bond approved by the justice. Thus far the transcript shows. It is shown by the oral testimony of the justice, taken on a motion to dismiss the appeal, that afterwards, but within the time limited for taking an appeal, the justice, conceiving that the bond should have the name of one of the principals to it, sent it to *John Hollensbe*, who signed it immediately, but did not return it to the justice until after the expiration of said time. The Court dismissed the appeal.

Upon affidavits showing these facts, and also the fact that *Edward* did not know of the action of the justice in withdrawing said bond from among the papers of the case, until after said limited time, and that the defendants had merits in the defence; the Court ordered an appeal to be permitted. In accordance with said order, a bond was filed and the transcript sent up.

A motion was again made to dismiss the appeal as to said *John*, on the ground that by receiving and retaining said first bond, until beyond the time limited for an appeal, he had

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waived any right he had to an appeal. The motion was sustained, the appeal, as to time, dismissed, and judgment against him for costs.

He now prosecutes this appeal. The questions presented are upon those rulings of the Court in dismissing.

We are of opinion that, the Court erred in ordering the first dismissal. When the appeal was prayed, the bond filed and approved by the justice, the party was entitled to his appeal, and the justice's duty was to make out and file a transcript in the proper office of the Court to which the appeal was prayed. The fact that the justice mistook his duty on the legal rights of the parties, could not change those rights. The withdrawal of the bond by said justice for one purpose could not divest the right, or affect the validity thereof in any different manner than if he had withdrawn it for some other and different purpose, because such withdrawal for any purpose was unauthorized and did not affect its validity.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Charles N. Shook, for the appellant.

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DAMAGES—MUTUAL NEGLIGENCE.—Where there is mutual negligence, if the defendant can not avoid the accident by reasonable care and skill, the plaintiff can not recover; nor can he recover where his negligence is proximate, and directly and materially contributes to the result, if the defendant could not have avoided the accident by ordinary care.

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PLEADING—PRACTICE.—Some points of pleading and practice are considered by the Court in the opinion herein, which are not susceptible of brief statement, and the reader is therefore referred to the opinion at length.

APPEAL from the *Shelby* Common Pleas.

HANNA J.—This case has been here twice before; 13 Ind. 213; 18 *id.* 168. After the latter reversal, an additional paragraph was added to the complaint, by which it was alleged that, in 1852, the plaintiff, being the owner of the land, &c., conveyed by quit claim to said company a strip of eighty feet wide, through the same, for said road, "provided said company would make three pits and haul all the good rail timber on said eighty feet, outside of said space for the use of said plaintiff; and, also, clear all the timber and brush from off said land;" that the road was constructed upon said strip and operated by the company, and that defendant did not clear off and remove said timber, &c., but wilfully and carelessly cut down into and across a small stream of water running through said eighty feet the trees growing and standing thereon, and wrongfully, &c., suffered said timber to remain across said stream of water until, &c.; that said road crosses said stream where it passes through said strip, &c., at which point the defendant constructed a culvert for the use of said road; that on, &c., the said stream became much swollen, and thereupon the defendant, by her agents and employees, wilfully, wrongfully, &c., pushed and moved the logs, &c., so felled across said stream, down said stream and against the fence of said plaintiff below said track, and thereby removed said fence, which was used to inclose a large pasture, adjoining, &c., in which were thirteen head of large cattle of plaintiff; that said fence, but for the wrongful act of the defendant, was sufficient to keep and confine, &c.; but that, in consequence of such acts of the defendant, said cattle escaped from said pasture, through the opening thus made in the fence, on

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to the road track, and were there wrongfully ran upon and killed by the locomotive, &c., of the defendant."

Previous to filing this fifth paragraph, the defendant moved to strike out the fourth paragraph, which was overruled, and also moved that the plaintiff be compelled to elect upon which paragraph, the third or fourth, he would try, on the ground that the third was based upon tort, and the fourth upon contract; this was also overruled.

A demurrer to the complaint assigning for cause that, "causes of action had been improperly united," was also overruled.

After the fifth paragraph was filed, by leave of the Court, a motion was made, and overruled, to strike it out; a like ruling was made on a demurrer thereto.

Thereupon, on leave, the answer before then filed was withdrawn, and the defendant answered:

1. Denial.

2. Carelessness of plaintiff, in this: that he neglected to repair his fence, &c., or to remove his cattle, &c.

3. As to the part of the complaint in reference to the duty of the defendant to remove the logs, &c., from said eighty feet, the statutes of limitations.

4. As to the charge of wrongful acts, &c., in pushing, &c., timber into the stream, that by reason of the swollen condition of the stream, timber and brush had, by the natural flow thereof, been carried against the culvert, &c., and to save it from being broken it became and was necessary to remove the same; which was done with due care, but a portion floated down, &c.

A demurrer was filed to each paragraph of the answer; sustained as to the third and overruled as to the others.

Reply in denial.

Jury trial, verdict and judgment for the plaintiff for 152 dollars and 50 cents, over a motion for a new trial.

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It appears to us that the motion and demurrer, based upon the theory that the third paragraph was in tort, and the fourth and fifth in contract, were correctly ruled upon. The leading idea, the gist, of the fourth and fifth paragraphs is, that, by the wrongful and tortious acts of the defendant, the plaintiff had been damaged. The manner in which the alleged wrong was perpetrated is detailed with particularity. The averments in reference to the conditions of the deed, and the failure of the defendant, in regard thereto, are but matters of inducement stated preliminary to the main charge of the wrongful act of the defendant.

A more difficult question is presented upon the ruling on this motion to strike out all that part of the complaint in reference to the contract to clear off the timber—in other words, the non-fulfillment of the condition in the deed. The same question is raised upon objections to the admission of evidence of the failure of the company to comply. The rulings of the Court in the progress of the case upon these points was against the defendant.

In the charges to the jury, the Court appears to have left entirely out of view the acts of, or failure to act by, the defendant in regard to cutting down and leaving upon the ground, or failing to remove the timber, &c., from said strip of land, and placed the right of the plaintiff to recover upon the establishment of wrongful acts by defendant in shoving logs, &c., into the stream and through the culvert, so that they were carried against the fence, &c.

Under these circumstances, we are rather inclined to the opinion that, if the charges, thus given, fairly embodied and presented the questions, in litigation to the jury, we should not disturb the finding, even if the Court had erred in refusing to shape the pleadings as asked, or in admitting the evidence objected to.

But, did the Court err in that behalf?

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The substance of the charges made by the plaintiff against the defendant, was that the defendant by misconduct and wrongful acts had injured the plaintiff. The answer, among other things, was that the damage had resulted immediately from the negligence of the plaintiff. This part of the answer was anticipated by that part of the complaint which attempted to show that, although the plaintiff had agreed to keep up the fences, yet there was, also, a further agreement that the defendant was to do certain things, which had not been done as agreed, and that by the failure to do as agreed, the defendant had, to say the least, made it more difficult for the plaintiff to keep up said fence, in this: that by partly performing the agreement, and negligently and carelessly leaving a part unperformed, the defendant had contributed to the wrong and injury which resulted to the plaintiff; and that such careless and wrongful act could be taken into consideration in connection with the subsequent acts of the employees of defendant, in determining the question of the proximate cause of the injury to the plaintiff.

But, aside from any liability arising out of precedent agreements, we will look a moment to the respective rights and relative duties of the parties.

Here, the company had a strip of land, eighty feet wide, through the farm of the plaintiff, and, we suppose, could use and enjoy that in any manner, not inconsistent with the grant, that it might determine—subject, nevertheless, to the rule of universal application, that every person in the enjoyment of his own property, shall so use it as not to injure the property of his neighbor. Broom's Maxims, 248; *Knewbaker v. The Cin. R. R. Co.*; 3 Amer. L. Reg. 359.

And to the further rule that, reasonable care is an universal duty of all men, in all cases and in all relations. 8 Amer. L. Reg. 390.

Tested by these rules and principles, the question is, whether

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the defendant so used its property? The evidence strongly tends to show culpable negligence, in this respect upon the part of the defendant, in this: that timber, &c., were cut down across and into the small stream mentioned, and suffered to remain there for an unreasonable length of time; so situated as to be exposed to be lifted and carried down against the fence with a rise of the waters of said stream. It was reasonable to anticipate such an event and to foresee the consequences, so far as the injury to the fence was involved. This was the remote cause of the injury and could have been prevented by the removal or destruction of the timber, &c. It would certainly put a different face on the affair if the timber, &c., had been carelessly placed and left above the culvert by the plaintiff; and, perhaps, but of this we determine nothing, the rule might be different if the drift wood had been brought from points beyond the immediate control of the defendant.

It appears to us, then, as before stated, that this was a matter proper to be considered, in connection with the immediate acts of the defendant's employees in attempting to dispose of the timber when it was in the swollen stream above the culvert and road track, to arrive at a correct solution of the inquiry whether the damage resulted from the wrongful and careless acts of the defendant. 1 Hilliard on Torts and Authorities, p. 98-99.

Whether the plaintiff contributed to the perpetration of the injury, by careless and negligent conduct, in failing to put up the fence, or removing his cattle, were questions that were, by the pleadings, evidence and instructions, fairly presented to, and, we suppose, passed upon by, the jury.

It is pretty hard to settle upon any set formula of words that will in every case, that may arise, show the non-liability of a defendant because of the acts of the plaintiff in regard to the same injurious act. When there is mutual negligence,

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if the defendant can not avoid the accident by reasonable care and skill, we suppose the plaintiff can not recover; so where the negligence of the plaintiff is proximate, and directly and materially contributes to the result, and the defendant can not by ordinary care avoid the accident. 1 Hiliard on Torts, 162; *Evansville, &c. v. Hiatt*, 17 Ind., 104; *Doon v. Mann*, 10 M. & W. 542; *Dowell v. The Steam Nav. Co.* 5 Ed. & B., 195; *New Haven St. B. Co. v. Vanderbilt*, 16 Conn., 421; *Birge v. Gardiner*, 19 *id.*, 507.

This Court has heretofore held that suits based upon kindred principles with this, could be sustained. *Porter v. Allen*, 8 Ind., 1, we think, is in point. It was shown that a log had lodged in the *Ohio* river within seventy-five yards of the defendant's landing, at his coal slide, and interfered with and threatened the destruction thereof. The defendant caused a steam boat to be fastened to it, and it was hauled out six hundred feet into the stream, and left on a bar about fifty yards from the channel. When the water raised, the flat boat of the plaintiff ran on to said log, was snagged, and sunk. For this the plaintiff recovered. The Court say that, "being an obstruction to the defendant's business, and dangerous to his property, he had an undoubted right to remove the log; but in the exercise of such right, the law would not allow him to leave the removed log, at a place in the river, where it would be likely to endanger the property of others." And, again, "the defendant, for the protection of his property, no doubt, had a right to remove the log, but the point of inquiry is, was its removal to a place in the river where boats can and do run, a reasonable exercise of his rights—a cautious regard for the rights of others?" See, also, *Howe v. Young*, 16 Ind. 312, and *Young v. Harvey, id.*, 314, and authorities cited in those two cases, where the whole question is considered.

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Per Curiam.—The judgment is affirmed, with 8 per cent. damages and costs.

Hendricks & Hord, for the appellant.

Stephen Major, for the appellee.

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PRACTICE—NEW TRIALS—APPEAL.—An appeal can not be taken from an order of the Circuit Court granting a new trial upon application made after the term, because such an order is merely interlocutory and not final.

PRACTICE IN SUPREME COURT.—The Supreme Court will much more reluctantly reverse the final judgment of a cause for error in granting than for error in refusing a new trial.

PLEADING—NEW TRIALS.—The rule that, where a new trial is applied for after the term, on account of newly discovered evidence, the evidence given on the trial had must be substantially set forth, does not apply necessarily where the new trial is applied for on other grounds.

APPEAL from the *Jackson* Circuit Court.

PERKINS, J.—Complaint for a new trial after the term. Demurrer to the complaint overruled; trial of the question; new trial granted; appeal from the award of a new trial to this Court. The judgment granting a new trial was an interlocutory, not a final judgment; and it was not one of those interlocutory judgments from which an appeal will lie by statute. The appeal, therefore, will have to be dismissed. It may be observed that a new trial may be granted after the term, on a proper case made, for any cause for which a new trial might be granted in term. 2 G. & H. 277.

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2. That the Supreme Court will much more reluctantly reverse the final judgment in a cause for error in granting, than for error in refusing a new trial. 2 G. & H. p. 211, cases cited in note j.

3. The rule, that where a new trial is applied for after term, on account of newly discovered evidence, the evidence given on the trial had must be set forth, does not apply, necessarily, where the new trial is applied for on other grounds. See the cases of *Hitchens v. Ricketts et al.*, at this term; *McKee v. McDonald*, 17 Ind. 518; *Glidewell v. Daggy*, 21 Ind. 95; *Cox v. Hutchens*, *id.* 219; *Ruddick's Adm'r v. Ruddick's Adm'r*, *id.* 163.

Per Curiam.—The appeal is dismissed, with costs.

Jason B. Brown and Martin Ferris, for the appellant.

William K. Marshall, for the appellee.

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GUARDIAN AND WARD.—The requirement in the statute that, before any one shall be appointed guardian, he shall file a statement of the ward's estate, is directory only, and failure to file such statement would not of itself render an appointment void.

REMOVAL OF GUARDIAN.—Where a guardian is appointed by the Clerk in vacation, the Court, at its next term, without notice, may remove him and appoint another; but a guardian appointed by the Court in term, or by the Clerk in vacation and afterwards approved by the Court, can not be removed by the Court without notice.

APPEAL from the *Grant* Common Pleas.

DAVISON, J.—This was a proceeding by writ of *habeas corpus*. *Lee* was the plaintiff, and *Ice* the defendant. The

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complaint upon which the writ issued alleges, substantially, that the plaintiff is the legal guardian of the person and estate of *Louisa Ball*, minor heir of *James A. Ball*, deceased; that she, *Louisa*, is forcibly restrained of her liberty, and wrongfully withheld from the plaintiff, at *Grant* county, by the defendant, and that he knows of no cause why she should be so restrained and withheld, &c.

Defendant, in his return to the writ, states that the father of *Louisa*, when about to enter the service of the *United States* in the present war, placed her in the custody of defendant and requested him, in case he should not live to return from such service, to retain her and bring her up in his family to womanhood, to which request the defendant agreed and at the time received her into his custody; that the father having died in said service, he, defendant, still retains her in his custody under said agreement. The return further states that defendant retains possession of *Louisa* by letters of guardianship duly issued to him by the Clerk of the *Grant* Common Pleas, on the 8th of *October*, 1863, of which letters a copy is herewith filed, &c.; that he has *Louisa* now in Court, and she is the same person named in the complaint, &c.;

Plaintiff demurred to the return; but his demurrer was overruled. He then moved to strike out the return, "so far as it alleges that *Louisa* was given up to defendant by her father in his lifetime;" but this motion was also overruled. He then replied:

1. By a denial.

2. That defendant did not, prior to the time, or at the time, the letters of guardianship were issued to him, or at any other time, file a statement of the whole or any part of the estate of *Louisa*, in the office of the Clerk of said Court, although she was then the owner of real estate of the value of 200 dollars, and personalty worth 190 dollars.

3. That the letters of guardianship were issued by the

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Clerk in vacation, and no record thereof was ever made by the Clerk, because, no statement of the estate of *Louisa* having been filed, he regarded the issuing of the letters a nullity.

4. That on the 9th of *November*, 1863, the same being the first day of the *November* term of said Court, the letters issued to the defendant were revoked, and he was removed from the guardianship, and proper letters were thereupon issued to the plaintiff, who, by virtue thereof, became and now is the regular guardian of *Louisa*, &c.

That branch of the return which alleges, "that the minor was placed in the defendant's custody by her father while in life," constituted no available defence and should have been stricken out. It may, however, be considered mere surplusage, and if, as further alleged in the return, the defendant has the custody of the minor by letters of guardianship duly issued to him, the writ of *habeas corpus* can not be maintained, and the return, the surplusage having been considered as stricken out, constituted a bar to the action; hence the demurrer to the return was correctly overruled. Nor were the matters set up in the second and third replies, or either of them, sufficient to avoid the answer. True, the statute enacts that, "before any person shall be appointed guardian he shall file in the office of the Clerk a statement in writing of the whole estate of the minor and the probable value thereof." 2 R. S., G. & H., p. 565, sec. 4. But this provision is merely directory, and a failure to file such statement before the guardian was appointed would not, of itself, render the appointment void. The guardian, after he has received his letters, may file the statement, and upon his failure to do so the proper Court, having cited him to appear, may annul his letters.

The issues were submitted to the Court, who found for the

Lee v. Lee.

defendant, and, having refused a new trial, rendered judgment, &c.

The evidence proves, substantially, these facts: *Louis Ball*, the minor, is about three years old, and defendant, on the 8th of *October*, 1863, appeared before the Clerk of the *Grant Common Pleas*, in vacation, and applied for letters of guardianship of her person and estate, and having given the bond, and taken the oath as required by law, such letters were issued to him by the Clerk. On the 9th of *November*, 1863, being the first day of the *November* term of that Court, the letters of guardianship issued to the defendant were, by the Court, revoked, and in his stead the plaintiff was appointed guardian, &c. Defendant did not appear to the proceeding in which his letters were revoked, nor was any notice thereof ever served on him, or issued. Were these proofs sufficient to sustain the finding? The appellee contends that the order revoking the letters issued to the defendant, having been made in a proceeding of which he had no notice, was a nullity, and, in consequence, he is still the legal guardian of the minor, and she is properly in his custody. We are not inclined to adopt this position. It is true, there is a provision of the statute which says, that "the Court may at any time remove a guardian, he having five days notice thereof, for neglect of his duties," &c. 2 R. S., G. & H., p. 568, sec. 11. This section, however relates to guardians appointed in open Court, or whose appointments, having been made by the Clerk in vacation, have been confirmed by the Court; and not to a guardian who is the mere appointee of the Clerk, because the Court may, in its discretion, confirm or reject such appointment, at the term next after it is made. *Id.* p. 27, sec. 33; *The State ex rel.*, &c. v. *Chrisman*, 2 Ind. 126. Here the defendant, having been appointed in vacation, the Court simply disapproved of the action of the Clerk in granting the letters, by revoking them, and this being the case, the

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defendant was not entitled to notice; because he was bound to know that his letters were subject to the approval or rejection of the Court at its *November* term, 1863.

The evidence, in our opinion, is not sufficient to sustain the finding, and the judgment must, therefore, be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Henry S. Kelley, for the appellant.

 JUDAH v. ZIMMERMAN.

PRINCIPAL AND SURETY.—Any material alteration of a contract, without the consent of the surety, will discharge him. The liability of a surety can not be extended beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract.

Zimmerman v. Judah, 13 Ind. 286, is approved and followed.

CONSTRUCTION OF CONTRACTS.—As to where several contracts, made at the same time, in relation to the same subject matter, and based upon the same consideration, will be construed as one contract, see opinion at length.

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, brought an action against *Charles H. Brown* and *Christopher Zimmerman*, upon a promissory note in this form:

“\$2,000.

Indianapolis, October 13, 1855.

“One day after date, we promise to pay *Samuel Judah* 2000

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dollars, without relief from appraisement laws, for value received.

C. H. BROWN,

"C. ZIMMERMAN."

Process, as to *Brown*, was returned "not found."

Zimmerman appeared and answered. His answer alleges, substantially, these facts:

At the time the note was executed, *Judah* and *Brown* entered into a written contract, by which *Brown* was to erect for *Judah*, a certain house, in the city of *Indianapolis*, to be completed and ready for occupancy by the 1st of *November*, 1856. The agreement fixes the amount to be paid, for the erection of the building, at 13,200 dollars; and, after fixing the times for the payment of various sums, amounting in the aggregate to 11,200 dollars, proceeds thus:

"As to the balance—2,000 dollars—it is agreed as follows: said *Judah* herewith advances to said *Brown*, as and for a loan, on a note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building, as in this contract is provided; and which note, also, shall not become or be payable, so long as said *Brown* shall progress with the preparation of materials, and with the erection of said building, so as to warrant the superintendent of the building, in the reasonable expectation of the progress and completion of the work, as herein before provided. *October 13, 1855.*

"CHARLES H. BROWN,

"C. ZIMMERMAN.

Surety, *Samuel Judah.*"

It is averred that the defendant signed said note and contract as the surety of *Brown*, and that the note, sued on, in this action, is the same note described in the above contract; that on the 5th of *June*, 1856, the plaintiff, without the con-

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sent or knowledge of the defendant, made another written contract with *Brown* and one *Richard Stokes*, (who had become a partner of *Brown* in the erection of the building then under contract between *Brown* and the plaintiff,) whereby it was agreed that they, *Brown & Stokes*, should put an additional story thereon for the further consideration of 1700 dollars, to be paid on the completion thereof. It is further averred that on *September 10th*, 1856, the plaintiff, without the consent of the defendant, made a certain other contract, in writing, with *Brown & Stokes*, by which he, the plaintiff, in consideration that the house should be enclosed by the 1st of *November*, 1856, and the entire building should be completed by the first of *March*, 1857, agreed that he would be satisfied and would claim no damages on account of the delay of its completion. And the defendant says that, by reason of the taking of *Stokes* as a partner, and the contracts for the additional story, and the extension of the time for the completion of the house, without his knowledge or consent, he is discharged of all liability on his contract of suretyship.

Plaintiff demurred to the answer; the Court sustained the demurrer and rendered final judgment against the defendant for the amount of the note and interest, &c. This judgment, upon appeal to the Supreme Court, was reversed. See 18 Ind. 286. And the cause having been remanded, &c., and being for trial in the lower Court, the plaintiff replied to the answer—

1. By a denial.

2. That the pretended alterations, alleged in the answer, to have been made, never were consummated, but were abandoned after being written out and signed by the parties; that the work upon the building, so far as it was performed, was done under the original contract, and that *Brown* abandoned the work, left the building in an unfinished state, and wholly failed to comply with his undertaking.

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8. That *Brown* failed in all respects and at all times to comply with his contract for the building of the house, and did not, at any time, "progress with the preparation of materials and erection of the building, so as to warrant the superintendent in the reasonable expectation of the progress of the work," as is provided in the contract.

4. That defendant is estopped from pleading the facts set up in the answer by the following clause in the contract, viz: "As to the balance, 2,000 dollars, it is agreed as follows: said *Judah* herewith advances to said *Brown*, as and for a loan on a note payable one day after date, the said sum of 2,000 dollars, which note shall be satisfied by the completion of said building as in this contract provided."

Plaintiff demurred to the second, third and fourth paragraphs of the reply. To the second and third the demurrers were overruled, but to the fourth it was sustained.

The issues thus formed were submitted to a jury, and, during the progress of the trial, the defendant, by leave, &c., filed a second paragraph to his answer. In this it is alleged, *inter alia*, that the plaintiff, without the consent or knowledge of the defendant, anticipated the period of payment, and deviated from the contract by paying to *Brown* various sums of money, in the aggregate amounting to 2,000 dollars, long before they were due.

The plaintiff excepted to the ruling of the Court in permitting the second paragraph to be filed, and the cause, on plaintiff's motion, was continued. After this, the defendant put in a third paragraph to his answer, alleging therein that sundry changes, which are specifically stated, were made in the building by *Brown* during the progress of the work, at the instance of the plaintiff, and without the knowledge or consent of the defendant.

Plaintiff demurred severally to these second and third paragraphs, but his demurrers were overruled, and thereupon he

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replied. His replies are in effect the same as the first, second and third replies to the first paragraph of the answer. There was a verdict for the defendant, and the Court, having refused a new trial, rendered judgment, &c.

Upon the facts alleged in the first defence we have in effect decided that the note in suit, and the original agreement, having been executed at the same time, and having relation to each other, constitute but one contract, and the second contract, which bears date *June 5th, 1856*, "was such an alteration of the first as to discharge the defendant, who was a mere surety." *Zimmerman v. Judah*, 18 Ind. 286. It is true the agreement states the amount of the note to have been advanced "as and for a loan;" but the stipulation that the note was to be "satisfied by the completion of the building as in the contract provided," at once shows that the money so advanced was not intended by the parties as a loan merely, but as a penalty to be recovered back in the event only of a failure to perform the agreement. This construction being correct, it follows, the defendant being a surety, that any material alteration of the original contract as to the erection of the house, or the time of completion, without his assent, would release him from all liability. *Chitty on Cont.* 529, 580. "Nothing," says Judge *Story*, "can be clearer, both on principle and authority, than the doctrine that the liability of a surety is not to be extended beyond the terms of his contract. To the extent and in the manner, and under the circumstances, pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal." *Miller v. Stewart*, 9 Wheat. 680.

In this case the second and third contracts were in writing,

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were based upon considerations which the law deems sufficient, and were binding on their parties. Under the second contract an additional story was to be put on the building, and the third extended the time of its completion. These, it must be conceded, were material changes of the original contract for the performance of which the defendant was surety.

The next inquiry relates to the validity of the fourth reply. Was the defendant estopped from pleading the facts set up in his answer? The point involved in this inquiry has been decided in *Zimmerman v. Judah*, *supra*, and we are inclined to adhere to that decision. There, it was held "that under a proper construction of the agreement, the money advanced by *Judah* was not intended by the parties as a loan merely, but as a penalty to be recovered back in the event only of a failure to perform the agreement." This being the case, there was no estoppel, and the demurrer to the reply was well taken.

The reasons for a new trial, so far as relied on, are thus assigned:

1. The refusal of the Court to instruct as moved by the plaintiff.
2. The instructions given were erroneous.
3. The verdict was unsustained by the evidence.

The instructions given, as also those refused, relate mainly to the same questions involved in the demurrers, which we have noticed, and upon which we have given an opinion. And as to the evidence, though it is to some extent conflicting, we think its weight sustains the verdict.

Per Curiam.—The judgment is affirmed, with costs.

S. Major, for the appellant.

Barbour & Howland, for the appellee.

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The decision herein rests alone upon the sufficiency of evidence to sustain a finding, and no point of interest generally is ruled by the Court.

APPEAL from the *Boone* Circuit Court.

DAVISON, J.—The facts alleged in the complaint are these: For several years prior to *December*, 1858, *James Craig*, who was the plaintiff, and *David Piersoll*, were partners in the mercantile and pork business, in *Jamestown*. In *December*, 1858, they dissolved their partnership; having at the time of the dissolution 2,900 dollars, and solvent notes and accounts to the amount of, at least, 17,000 dollars, making in all 19,900 dollars. The firm owed, to different persons, 10,000 dollars. At the time aforesaid, the plaintiff sold to *David Piersoll* his interest in the partnership property including the goods, notes, and accounts, &c., for 5,000 dollars, for which he, *David*, executed his notes to the plaintiff, and agreed, as part of the consideration of the sale, to pay off and satisfy all the outstanding debts of the firm. Shortly after the sale, *David* and *John Piersoll* entered into partnership, and as partners, carried on business at the same place with the *Craig & Piersoll* stock of goods. It is alleged that *David Piersoll* failed to pay off the partnership debts, of which 2,000 dollars, as yet, remains unpaid, and for which the plaintiff has been sued and judgments recovered against him; that of the 5,000 dollars which *David* was to pay the plaintiff, 4,611 still remains due and unpaid, and for which he, plaintiff, has a judgment against him in the *Boone* Circuit Court, of the date of *March*, 27th, 1861; that in the year 1861, the defendants confederated together for the purpose of defrauding the plaintiff and the creditors of the firm of *Craig & Piersoll*, and in furtherance of that purpose, *David* pretended to sell and trans-

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for all his property to *John*, amounting to 20,000 dollars, and from the time of this sale henceforward *David* has held himself out to the plaintiff and said creditors as insolvent, &c.; that *David Piersoll* had property and means sufficient to have paid the plaintiff and the creditors of *Craig & Piersoll*, if they had been honestly applied; but soon after the defendants commenced business as partners, they began to collect from the notes and accounts of *Craig & Piersoll*, and appropriate the money to their own business and purposes, instead of applying it to the payment of the aforesaid debts, and when they could not get the money on such claims, they surrendered them to the persons owing them, and took notes for them in the name of *John Piersoll*, on which notes, so obtained, he has recovered judgments in the *Hendricks* Circuit Court, as follows: one judgment against *Iddings & Porter*, for 122 dollars; one against *May & Porter*, for 419 dollars; also, judgments in the *Boone* Circuit Court against divers persons, amounting in the aggregate to 1,900 dollars.

The relief prayed is that the defendants, and each of them, be enjoined from the further collection of said judgments, notes, and accounts, &c.; that they be required to account for said partnership property, and that so much thereof as may be necessary, be applied to the payment of the plaintiff and the creditors of the firm of *Craig & Piersoll*, and such other and further relief, &c.

Upon this complaint, the same being verified by affidavit, and the proper undertaking having been filed, the Court granted an injunction as prayed for, and thereupon the defendants filed their answer, and issues having been made, the cause was submitted to the Court, who found, *inter alia*, that the matters and things alleged in the complaint were true; that *David Piersoll* was indebted to the plaintiff by judgment theretofore rendered in the *Boone* Circuit Court for 4,611 dollars as set forth in the complaint; that *David* is without the

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means of paying the same or any part thereof, out of moneys or property held in his own right; but that *John Piersoll* had a large amount of property, consisting of notes, accounts, moneys and judgments sufficient to pay said debt, which had been transferred to him by *David*, with intent to defraud his creditors.

The finding then proceeds to enumerate certain judgments in the *Hendricks* Circuit Court and in the *Boone* Circuit Court, which *John Piersoll* then held, uncollected, as the property of *David Piersoll*. These judgments are, in the finding, described by name and amount. And the Court, upon its finding, adjudged that the defendants, or either of them, be enjoined from collecting or receiving the proceeds of said judgments, and that the officers of the Circuit Courts of *Hendricks* and *Boone* counties, be required to pay over the several amounts collected on the same to the plaintiff, to be applied to the satisfaction of his judgment against *David Piersoll*; and further, it was adjudged that the plaintiff recover his cost, &c.

Defendants moved for a new trial; but this motion was overruled and they excepted. The evidence "given in the cause" is all upon the record, and the only question to settle is, does it sustain the finding?

We are not inclined to set out the evidence in detail; but, having examined it carefully, are of opinion that it is insufficient. Neither of the judgments described in the complaint appears to have been introduced on the trial; nor does it appear that the Court, upon the trial, had any legitimate proof of their existence.

In view of the record before us, we think a new trial should have been granted.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

McDonald & Roache, for the appellant.

S. C. Wilson, for the appellee.

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THE BOARD OF COMMISSIONERS OF BARTHOLOMEW CO. v. BRYAN.

CORONER'S FEES—STATUTES CONSTRUED.—The fees of a coroner for holding an inquest or making a *post mortem* examination, must be collected of the estate of the deceased person, and not merely of the property found with the dead body, unless such estate be insufficient to pay them, and in such case they may be collected of the county.

APPEAL from the *Bartholomew* Circuit Court.

DAVISON, J.—The appellee, who was the plaintiff, brought this action against the Board of Commissioners, to recover his fee, as coroner, for holding an inquest over the dead body of one *Joshua Crossby*.

The cause was submitted to the Court upon an agreement of facts which is as follows:

"Plaintiff, on the 8th of *April*, 1863, was the coroner of *Bartholomew* county, and as such held an inquest and *post mortem* examination over the dead body of *Joshua Crossby*, and, for his services therefor, is legally entitled to fees, to the amount of 5 dollars and 50 cents. The estate of the deceased is solvent, and administration has been properly granted thereon. The only question involved is, whether the fees named should be paid by the county, or by the estate of the decedent. If they are legally chargeable against the county then, the judgment is to be in favor of the plaintiff, for 5 dollars and 50 cents, and costs. If not so chargeable, the judgment is to be for the defendants for costs," &c.

Upon these facts the Court found for the plaintiff, and, having refused a new trial, rendered judgment, &c.

In relation to the point involved in this ruling, the statutes now in force provide thus:

"SEC. 20. The fees of coroners, for impanneling and swearing a jury and witnesses, and making and returning inquisition for the view of each body, shall be 5 dollars.

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"SEC. 23. All fees of inquests shall be paid out of the property of the deceased person, if there be so much belonging to such deceased. If not, then out of the county treasury." 1 R. S., G. & H., p. 338.

Thus, it will be seen, that the coroner's right to a fee is purely statutory, and under the statute, the liability of the county, for such fee, does not attach, unless the decedent, at his death, had not property sufficient to pay it. This is, no doubt, a proper construction of the statute; and as, in this instance, it is conceded that *Crossby*, when he died, had an estate, which is in the hands of his administrator, and is solvent, we must presume that there is enough of it to pay the fee, and, in consequence, the county is not liable.

But there is another provision of the statute, referred to, by the appellee, which makes it the duty of the coroner to "require the jury to examine and make report of the amount of money, or other valuables found with the dead body, which amount of money or other property, if there be no person to take charge of the same, shall be placed in the hands of the treasurer of the county in which said body may be found, and by him paid over to the person or persons authorized to receive the same, if any such person shall call therefor. But so much thereof as may be necessary, may, by the treasurer, be appropriated, under the order of the Board of Commissioners, to paying the burial expenses of the deceased." 2 *id.* p. 18, sec. 11.

Under this section, it is insisted that if there is no property found "with the dead body," the county is liable, though the deceased might have other property belonging to him sufficient to pay the fee. This position is untenable. Between sec. 23 and the provision just quoted, there is no apparent connection. The latter relates, not to the payment of fee; but to the disposal of money or property found with the dead body, and to "the burial expenses of the deceased."

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As we construe the statutory provisions, to which reference has been made, the county is not liable for the coroner's fee, if the deceased, at his death, left property enough to pay it; though the same may not be found "with the dead body."

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Francis T. Hord, for the appellant.

A. H. Bryan, for the appellee.

PEPPER v. THE STATE *ex rel.* HARVEY.

PLEADING—RELATOR—AUDITOR OF STATE.—In actions to recover money due to the State from a county treasurer and his sureties, the Auditor and not the Treasurer of State should be the relator.

OFFICIAL BONDS—EXECUTION OF.—Where an official bond is drawn up and certain names are inserted in the body of it as obligors, and a part only of such names are afterwards signed to it, the obligation will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so prepared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery.

SAME.—Where such a bond is presented to such a person for his signature, by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it.

SAME.—Where such a bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicit-

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ed by him, and he represents to them severally that, before its delivery he will procure the signatures of a certain number of other persons, as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and others sign it in consideration that such other signatures shall be procured, and such other signatures are not procured, these several classes of persons, in defence to an action upon such bond, may show these facts.

SAME—BOND OF COUNTY TREASURER.—Where such bond is the bond of a county treasurer, it must be approved and accepted by the board of commissioners of the county, and if such board appoints no person as agent to procure its due execution, and on its presentation institute no examination into the mode of its execution or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval.

SAME—DUTY OF COUNTY BOARD.—In reference to such bonds it is the duty of the board of commissioners, before accepting or approving them, to ascertain that the sureties possess the qualifications required by law, and that the bonds were duly executed by those whose names are signed to them, and that the sureties are in the aggregate worth enough to make the bond sufficient in that respect.

APPEAL from the *Franklin* Common Pleas.

HANNA, J.—The State on relation of *Harvey*, State Treasurer, brought an action on the bond of *Batzner*, county treasurer of *Franklin* county, for defalcation. Default as to *Batzner*; appearance for the sureties. Demurrer to the complaint for the following reasons:

1. That the plaintiff has no capacity to sue.
2. Defect of parties plaintiff, in this, that the Auditor of State is the only officer having legal capacity to sue.

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8. The complaint does not contain facts sufficient to constitute a good cause of action.

These appellants also file a separate demurrer to each of the three paragraphs of the complaint. Demurrer sustained to the first and overruled as to the other paragraphs. Answers by all the defendants separately or together, amounting to *non est factum*. Reply: general denial; trial by the Court; finding against all the sureties but one *Grinkmier*. Motion for a new trial overruled, and judgment on the finding for over 25,000 dollars, and this appeal prosecuted to reverse that judgment.

The reasons for a new trial are:

1. The Court erred in overruling the demurrer to complaint.
2. The judgment is contrary to the evidence.
3. The judgment is contrary to law.
4. The judgment should have been for the defendants below.

The errors assigned are precisely those named in the motion for a new trial. The evidence is set out in a bill of exceptions. All the sureties, or nearly all, were examined under oath as witnesses.

The only questions raised and discussed in this Court, are:

1. Is the suit well brought in the name of the State on relation of the State Treasurer?
2. Is the bond binding on the sureties under the circumstances shown in the evidence?

As to the first question, we are of the opinion the suit should have been upon the relation of the Auditor of State to recover the funds, as shown here, due the State, for the plain and simple reason that the statute so provides in the "act prescribing the powers and duties of Auditor of State."

"SEC. 2. He shall, * * * 6th. Institute and prosecute, in the name of the State, all proper suits for the recovery

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ery of any debts, moneys or property of the State, or for the ascertainment of any right or liability concerning the same.

"7th. Direct and superintend the collection of all moneys due to the State, and employ counsel to prosecute suits at his instance, on behalf of the State."

"SEC. 7. Whenever any officer or other person shall render an account to and make settlement with the Auditor, as in this act required, and shall fail to pay over to the Treasurer of State the amount to be paid by such officer or person into the State treasury, or to such person as shall be entitled by law to receive the same, within the time prescribed by law, or if no time is prescribed by law, then within the time specified by such Auditor; the Auditor, upon being notified by said Treasurer, or otherwise, of such failure, shall institute suit for the recovery of the amount due and unpaid." 1 R. S. pp. 147-8.

In this case, it is averred, a settlement with the Auditor had been made.

Perhaps it is useless to search for the reasons for the passage of said statutes; but it appears to us that they are so obvious, that we will, for a moment, advert to them. Any mode of auditing, adjusting, settling and keeping a record of public accounts, and of receiving, keeping and disbursing the public moneys, was intended to be based upon what is called a system of checks and balances. The Auditor of State keeps an office in which settlements and adjustments, &c., are made, of claims against and in favor of the State. In that office ought to appear the exact sums in the hands of the Treasurer of State belonging to any particular fund. At the time this suit was instituted no funds could properly get into the State treasury except upon a certificate of the Auditor of State to the Treasurer, stating the amount to be paid and to what fund, and upon a draft by said Auditor, in favor of the Treasurer upon the person who is to make the payment:

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Acts 1859, p. 227, § 6. Further, it is only in the Auditor's office that, in the first instance, a statement of the accounts of county treasurers with the State can be found. Sec. 2, part 2d, 1 R. S. p. 146. It is true, the balance is certified to the Treasurer of State. It is not by virtue of that mere balance that the suit is maintained, but upon a copy of the account certified by the Auditor. In a word, the Auditor superintends the fiscal concerns of the State. *Id.* 147. This he might not be able to do if the Treasurer could sue for and collect moneys belonging to the State in his name. We have decided that a county treasurer can not, of his own volition, sue his predecessor. *Snyder et al. v. The State ex rel.*, at this term.

As to the second question made, we will notice the evidence bearing upon it.

The evidence of *Grinkmier*, one of the sureties, was positive that he had not signed the bond nor authorized any other person to place his name to it; that he could not read nor write, and it was shown that the hand writing was *Batzner's*. Upon this the Court found that as to said surety the signature was a forgery.

Levi W. Buckingham, one of the sureties, testified that his signature was thus obtained: he asked *Batzner* if *George Berry* and *Daniel D. Jones* were going to sign, and he said they were. He also said that he intended to get a hundred good men on the bond. *Buckingham* then signed, and was induced to do so by having the assurance of *Batzner* as to the number, and the particular persons he expected to obtain as sureties on the bond. To *Auguste Pepper*, another appellant, *Batzner* said he must or would have a hundred names on the bond; and because of this pledge *Pepper* signed. Was not informed what the paper was for; supposed it was for the character of the man. *Walter* was assured that *Batzner* intended, in addition to the persons on his bond for the term

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then expiring, to get a hundred good men; thinking, in that case, there could not be much danger, he signed also. *Schroeder* was told by *Batzner* that he had to have a hundred good men on it, and on these conditions he signed the bond. *Henry Berry*, knowing that *Batzner* had promised to get a hundred good men on his bond, asked him if he intended to redeem his pledge. He replied he did so intend, and, if necessary, he would get two hundred. *Berry* then told *Batzner* if he would get one hundred good men on the bond he would sign it. He promised, and *Berry* signed. *Simpson Calfee* was promised if he would put his name down a hundred good men should be obtained to sign the bond also; and he swears he signed by means of this inducement. To *John H. Quick*, *Batzner* promised he would get a hundred good men on the bond before he presented it to the commissioners. To *John Martin* he declared he would have a hundred good men on the bond before he attempted to file it. He then signed with that understanding. *Alther* was promised not less than two hundred names on the bond, and on that consideration he signed it. To *Adam Feltz*, *Andrew Grob* and *David V. Johnson* he made the same pledge—that he would get a hundred sureties.

The evidence of two of the county commissioners is in the record. The record of the board shows that the bond was approved on the 3d of *November*, 1862, with the names of the appellants attached, and those, also, of *Batzner* and *John Grinkmier*, in all, thirty-one names. The testimony of the commissioners is that, after the bond had been presented for approval, it was rejected as insufficient. *Batzner* took it away and returned with additional names. Among those added was that of *John Grinkmier*. The new names include that of *David V. Johnson*, and four others below it. That of *Witt* appeared after it.

These are the substantial facts upon the point in question. Neither *Geo. Berry* nor *Jones* signed the bond. The sureties

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were not present before the county board to execute or acknowledge the execution of said bond. *Batzner* had procured the signatures at various places in the county and on divers days.

There is no contest about *Grinkmier* having been properly discharged.

The other sureties appear to be divided into three classes, such as signed after *Grinkmier*; such as affixed their signatures in view of the representations and motives heretofore set forth, as shown by the evidence; and such as signed without having been so influenced.

There are many old authorities to the effect that, if a bond is drawn up with the names of several persons inserted in the body of it, as the intended obligors, and it is signed by a part only of those persons, it is not binding upon them, upon the theory that the presentation of the instrument to said persons, so prepared, amounted to a representation that all the persons whose names were so inserted were to become likewise bound. See *Fletcher v. Austin*, and authorities cited, 11 Ver. 449; *Sharp v. The United States*, 4 Watts 21.

It seems to us very clear, in view of this principle, that the presentation of this bond to *Witt*, who signed after *Grinkmier*, was as effective a representation that the latter was to be a co-obligor with said *Witt*, as would be conveyed if his name had been in the body of the bond. If, in the latter instance, the signature would not be binding on one unless all signed, so we think in this case, *Witt* would not be bound unless all those names preceding his were also bound; provided the fact that the bond was not presented by the obligee does not vary the rule; a question which we will hereafter examine. *United States v. Lefler*, 11 Peters 88; *Luly v. The People*, April number Amer. L. Reg. 844. This latter was a suit upon a bond of a master in chancery, in which it appeared that the name of one *Heaton* was first in order as signed and recited in said

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bond, as surety, and that it was a forgery; that it so appeared when presented to and signed by *Luly*, who was the next surety. The bond was joint and several. The Court say: "Although we have not been referred to, nor have we met with, a case precisely in point, yet we think upon principle, this should constitute a good defence to the action on the bond. By a fraud practiced upon the defendant, * * he was made to assume a different and greater liability than he intended, or supposed he was assuming, when he executed the bond."

As to those who affixed their signatures, after the representations, or promises and pledges made by *Batzner*, as heretofore alluded to, a part of whom stated that they were so induced to sign; a part that such was the condition upon which they signed, and still others that such was the consideration of their signature, it is more difficult to determine whether they should be considered as bound by their acts.

It is made the duty of a person, chosen to the office of county treasurer, to execute his official bond with sureties to the acceptance of the board of county commissioners. 1 R. S. 1852, p. 499. Such bonds are made payable to the State of *Indiana*. *Id.* 166.

The execution of a bond, involves the signing, sealing and delivering thereof. As these bonds could not be delivered to the State—the obligee; the law names officers or tribunals to whom they can be delivered; namely, first, to the acceptance of the board of county commissioners, and then to be filed in the clerk's office of the county. *Id.* 166, secs. 4 and 5.

The bond is, among other things, to secure the amount of money which may come into the hands of the treasurer during his term of office. As this would include money belonging to the county, as well as to the State, which he might receive therefor, the said board is made the actors in accepting his bond; because such board has the general control and man-

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agement of the fiscal affairs of the county, and in auditing the accounts of officers having the care, collection and disbursement of the funds of the county. *Id.* pp. 224, 227.

We suppose that, under these provisions, the clerk of the Circuit Court is the mere custodian of the bond, and the county board acts for the obligee in accepting it. What, then, is the duty of said board in accepting a bond? Clearly, to carefully consider the sufficiency of the bond, as to its legal construction, as to the amount thereof, and as to the solvency of the persons whose names appear as sureties. About this there will, we suppose, be no controversy. Now, it is equally clear that a bond might be prepared in due form, in a sum sufficiently large; the names thereto attached might represent persons owning property amply sufficient to meet any liability that might arise under it; and yet, if, in point of fact, any legal reason existed why the persons whose names so appear are not really bound thereby, the security would be worthless. The names might be forged, or might represent persons of ample means, but resting under a disability to so contract; or the signatures may have been obtained thereto, and the instrument placed as an escrow in the hands of a third party, not to be delivered until after the performance of a precedent condition; such as the execution by the principal of a bond of indemnity to those who signed as sureties, and those surreptitiously obtained by the principal and presented for acceptance.

We presume, in neither of these cases would an acceptance merely, bind the sureties, nor would the county board be in the strict line of duty by accepting without inquiry. If not, how, or in what, would these instances differ, in principle, from the facts involved in the case at bar? In the one instance the persons did not attempt to contract; in another they were willing to contract, if they were secured; in another they had no capacity to contract. It will be seen

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that in each instance, the acceptance of the bond would be unavailing as a security for the funds that might come into the hands of the treasurer, because the bond had not been executed by parties capable and willing to contract. The principle, then, upon which the defence in each of the supposed cases would rest, would be the non-execution.

Waving, for the present, the consideration of the effect of the circumstances under which several of the signatures were procured, we will proceed at once to the examination of the most difficult point which is presented by the facts in the case; namely, that growing out of the relative position of the parties to the bond and those who acted in the premises.

The State could make no representation, nor, as before stated, accept the bond. The duty of accepting is by law devolved upon the board of county commissioners. If the board is, strictly, but the agent of the obligee in accepting said bond, it might be gravely doubted whether said agent could confer upon another any part of the powers so delegated. If the said board is not a mere agent, then, perhaps, another might be, by said board, invested with certain powers connected incidentally with the acceptance of said bond; such as might conveniently insure the due execution thereof. If the board is the mere agent of the State in the matter, without the right to invest sub-agents with authority, then, it appears to us, that, whether acting in a ministerial or a judicial capacity, there could be but one course in accepting a bond, and that would be to institute inquiry and pass upon all questions connected with its due execution, including the delivery thereof. It would thence appear to follow, that the conclusion of such an inquiry would form a proper subject for a record. That record, to be conclusive upon the parties sought to be bound, should show that due preliminary steps had been taken to make them parties to it. The safety of the various funds, passing into the hands of a treasurer, as

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well as the interest of private persons, would seem to imperatively require some such course as this. Indeed it is, we believe, in various counties of the State, the usage, under said statute, and, we are inclined to think, the safest construction thereof.

But, we will proceed to examine another construction sought to be placed upon these statutes, and the powers and rights of the county boards; and in the event this construction, contended for, shall be conceded, it may be that a conclusion upon the point above indicated, may not be necessary.

It is insisted that the board of county commissioners adopted the acts, and consequently the representation of *Batzner*, in procuring signatures to said bond, as their acts, &c.; that they had the power, in that respect, to constitute him their agent.

Looking to the fact that, the bond of the county treasurer is not alone to secure the separate interests of the State, the obligee named, by law therein, but also to secure other interests, over which said board have almost exclusive control; we are inclined to the opinion that, as to questions connected with the execution and approval of said bond they have some primary powers and rights; such as the right to appoint a person, for instance their clerk, the auditor, to see to the due execution of the bond, that it is properly framed, &c., before presentation. If this is so, we see no valid reason why they might not make the principal obligor in the bond their agent for such purpose. If they could do so before he acted, why could they not adopt his acts afterwards? For instance, did they not adopt the result of his acts in this case? That is, they accepted the bond to which he had procured signatures, without inquiry as to the genuineness of the signatures or the means that had been resorted to to procure the same. Upon what theory did they act, upon what principle did they proceed in so accepting said bond? Certainly, so far as the

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obligors were concerned, upon the theory that the principal represented them in the presentation of the said bond. And we must assume either that they were entirely derelict in their duty as to the proper inquiry in reference to the execution of said bond, or that they accepted it upon the faith of the fair dealing of *Batzner* in procuring its execution. If they relied upon his acts, they, that far, adopted them as a substitute for the inquiry they should have made, and, in adopting the result of his acts, they can not get rid of the means he used to procure such results. *Judah v. The Vincennes University*, 16 Ind. 70.

This brings us to a proper point to inquire as to the effect of the promises, pledges and representations which *Batzner* made. Perhaps it is true that, under the circumstances of this case, *Batzner*, in making said representations and promises, acted without authority from the county board, and that in presenting said bond he was acting for himself and those who signed it. It might be a very serious question whether, in presenting it before the fulfillment of the conditions or redemption of pledges upon which signatures were procured, *Batzner* merely exercised his authority as the agent of his co-obligors; if the board could have accepted it without adopting his acts.

Judge *Redfield*, in the *American Law Register*, in a note to the case of *Luby v. The People*, says:

"The law seems to be well settled that a bond or other instrument, not negotiable, when one or more of the sureties sign with the assurance that the paper is not to be delivered, as a binding contract, until all whose names appear in the body of the instrument have become parties to it, will not be binding unless this condition is complied with." *April No.*, 1863, p. 346 and note.

What would have been the practical result if they had not relied upon his good faith in procuring and presenting said

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bond? They would have, in the regular discharge of their duty, instituted an inquiry into the question of the execution of the bond, as well as that which they did inquire of; namely, its sufficiency.

This inquiry, we must believe, would have developed the facts that are now set up in defence and defeated the acceptance of the bond, if they are now sufficient to discharge the liability of said obligors.

That they are sufficient as to all who signed, with the understanding, or upon the condition, that the bond was not to be presented, consequently not to become operative, until certain other persons signed it, or until a certain number and quality of men signed it, is well established by the following authorities and cases. *The United States v. Sheffler*, 11 Peters, 86; *Pawling v. The United States*, 4 Cranch, 219; *Fertig v. Buchu*, 3 Barr. Penn., 308; *Sharp v. The United States*, 4 Watts, 22; *Lovett v. Bowne*, 3 Wend., 380; *Fletcher v. Austin*, 11 Vermont, 448; *Bibb v. Reed*, 3 Alabama, 88; 2 Mumford, 83; 7 Pick, 91; 2 Leigh, 157; 1 Barn. & Cress., 682; 4 Johns. R., 280; *Johnson v. Baker*, 4 Barn. & Ald., 440; 2 Harrington, 896; 7 Ohio, 354; *Duncan v. The United States*, 7 Peters, 435.

In 2 Greenleaf's Ev., sec. 297, it is said that: "The delivery of a deed is complete, when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent." To which, is a note, citing a great many cases. See, also, 34 N. Hamp., 474, and authorities cited, and 13 Ohio State Rep.; 2 Black. Com., 307; 4 Kent, 254; 13 Pick., 75; 1 Johns. cases, 114; 2 John. R., 274; *id.* 280.

In the case in 11 Peters, the suit was upon a bond given by one Curtis, as principal, and *Leffler* and others as his sureties for the performance of his duties as collector of taxes, &c. Judgment had been taken against said Curtis. Part of said sureties pleaded *non est factum*. To support the issue made

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as to the execution of the bond, the deposition of *Curtis*, the principal, was offered in evidence by the surety, was objected to, but admitted, and the judgment was in favor of such surety, and affirmed in the Supreme Court of the *United States*. In the reports, the statement of the facts of the case shows what was contained in the deposition, but does not show whether there was any other evidence upon that point. The Supreme Court decided that, the evidence was properly admitted, and, we think, that from the opinion it may be inferred that said evidence was material in the case, perhaps decisive thereof; and was as follows: "The deposition stated that *Jacob Leffler* and *Reuben Foreman*, executed the bond under the impression, and on the condition that the deponent could procure the signatures of other persons to the same, and they were not so procured." It appears to us, from the whole opinion, that the judgment would not have been affirmed if the facts stated by the witness had been thought insufficient to discharge the sureties.

The case in 4 Cranch, was also on the bond of a collector. The plea by the sureties was that the bond was signed by them and delivered to the principal obligor as an escrow to be by him safely kept, upon condition that if other persons named in the face of the bond should execute it, then it should be delivered as their deed, &c. Issue being joined, there was a demurrer to the evidence, and the Supreme Court of the *United States* say that the judgment on the demurrer ought to have been for the defendants. That evidence showed that the first surety who signed did so on the condition that certain other persons named should also sign; that when the next three persons signed, one of them inserted, in the body of the bond, the names of the persons whom the principal and said surety stated were to sign; and, calling upon the witnesses to take notice that others were to sign, said, "we

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acknowledge this instrument of writing, but others are to sign." Those others did not sign.

In the case in 8 Barr., the sureties on the bond of a sheriff brought suit on a bond, which they alleged was executed by certain persons to indemnify them as such sureties. The defence was that, the bond was never delivered because all the persons that were to sign it had not done so. The evidence was very clear that, it was not so signed nor was it delivered; more so, perhaps, than in this case. We refer to the case for the purpose of alluding to the language of the Court, as follows: "It would certainly make a great difference to the defendant whether he was bound in company with eleven others in this bond of indemnity, or with a less number. * * * If the defendant in executing the bond, expressly stipulated that it should not be delivered up until twelve names were obtained, and the plaintiff's agent so provided; the bond was in his hands but in the nature of an escrow, and if the condition was not performed, it was never legally delivered and so was never the defendant's deed."

The point in the case in 8 Wendell, like that in 11 Peters, was upon the admission of the evidence of the co-obligor in reference to the delivery of the bond, but, like that, the reasoning, it must appear to us, in the case supports the view we have taken of the case at bar. The Court say that: "If a bond be signed, and put into the hands of the obligee or a third person, on the condition that it shall become obligatory upon the performance of some act by the obligee, or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent be performed. Until then there is no contract."

In the case in 11 Vermont, one *Fletcher*, being sheriff, had appointed one *Purkhurst* his deputy, who presented him with a bond to secure the performance, &c., in the body of which the names of seven persons appeared as sureties; but two

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had signed. *Non est factum* pleaded by those two. Proof admitted that when the bond was signed by said two persons they delivered the same to said *Parkhurst* and directed him not to deliver it to the plaintiff until it was also executed by all the other persons, &c., and that it was not so executed until after default; but there was no evidence that said *Fletcher* was informed of the facts, &c. There was a verdict and judgment for the defendants, in which the Supreme Court, in affirming the same, say: "As to the two who first signed, it is evident that the bond was never delivered with their consent. They might require such terms and conditions to be complied with as they thought proper before the deed should take effect as their deed." * * * * "The conclusion is that they never agreed to become sureties for the acts of the principal unless others should become jointly sureties with them."

The case cited from 3 Alabama, was a suit on an administrator's bond, in which the sureties pleaded a special *non est factum*, and that the bond had been by them delivered to the principal, but was not to be delivered to the obligee only on the condition that the same should be executed by, &c., as co-sureties, and on that condition said principal was to deliver the same to the said obligee as the deed of said sureties; that said other persons did not sign, &c., but said deed was, by the principal, delivered, &c. On the trial the defendants had judgment, in which the Supreme Court, in giving judgment of affirmance, say:

"The defendants were the sureties of one *Whitman*, as administrator, and delivered the bond to him on the condition, that if another person signed it as co-surety, it was then to become their deed. It is urged that the conditional delivery could not be to the principal obligor, but to operate as a conditional delivery it must have been made to a stranger." * * * "Delivery must be by the obligor himself, or by some

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one authorized to act for him. In this case, the efficacy of the delivery of the bond unconditionally by *Whitman* must depend on his authority to do the act, and it would seem impossible to hold that an authority to another to deliver a bond, only upon the performance of a condition, was an authority to deliver absolutely;" and again: "We are satisfied that on principle there can be no difference between a conditional delivery to a stranger, or to a co-obligor; that in either case the deed can not be operative until the condition is performed, and such is clearly the weight of the authority at the present time. It was also urged, on the ground of public policy, however the law might be in other cases, that, in cases like the present, where infants and creditors were concerned, and the due execution of the bond entrusted to a public officer, no conditional delivery could be made. We can see no reason for such a distinction. The judge of the County Court is, by law, appointed to take the bond, and it is his duty not only to be satisfied that the sureties are able to respond in damages if called on, *but also to know that it has been executed by them.*"

In the case cited from 7 Peters, the suit was upon an official bond, in the body of which was the name of the principal obligor and three sureties—but executed by two only. The defence was that those who signed did so with the stipulation and understanding that another person was also to sign it, who had never done so. The Court said that: "It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen."

We have also before us a copy of the manuscript opinion of Judge *Betts*, of the southern district of *New York*, in a case of *Law & Conoon v. The United States*, delivered July 2,

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1860, in a proceeding by them, in equity, to have declared void a bond, purporting to have been executed by them, as sureties of one *Fowler*, deputy post-master at *New York*. It appears from said manuscript, that the allegations in the bill, so far as they are in point in this case, were that said *Law & Conoon* executed said bond in the sum of 75,000 dollars, and delivered the same to said *Fowler*, under the express understanding and agreement, that before said bond should be complete, or delivered to the government, or to or for its use, it should be executed also by one *Oliver Charlick*; that it was not so executed by said *Charlick*, and was, without their consent, transmitted by said *Fowler* to the appropriate department at *Washington*; that upon inspection of the original bond, it appeared that on the day of the date of said bond, one *Henry Hilton* signed it as a subscribing witness, and, in his capacity of Judge of the *New York* Common Pleas and ex-officio justice of the peace, administered an oath to each of said sureties, which was indorsed in print upon the back of said bond, and subscribed by each of them, in which they each depose and say: "he has executed the within bond, that his place of residence is," &c., &c. It was urged that this amounted to an acknowledgement, &c., of said bond. The Judge says: "I think no higher legal effect is acquired for the bond by that method of verifying its execution than satisfactory oral evidence of the signature of the parties would be. * * * Nor does it in any way preclude the proof that it was executed conditionally." He further says that "a vital constituent to a bond is the delivery of it from the obligor to the use of the obligee. It remains inchoate and inoperative until that act is completed. * * * A sealed obligation never takes existence as a deed or specialty until a delivery be made of it by the obligor, or the terms upon which its absolute delivery may be suspended have been fulfilled. These may be regarded as elementary principles of the common

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law, determining the requisites of deeds or sealed obligations, although in books of evidence the rules may be found subject to diversities of application. 1 Greenl. Ev. § 568, note; 3 Cow. & H. notes to Phil. Ev. pp. 1276, 1281, 1286, 1453. Yet I apprehend none of them depart from the main doctrine of the common law, and all concur in requiring clear proof that the grantor or obligor has absolutely parted with the possession of the deed to the uses for which it was executed. The cases referred to show that a broad freedom of inquiry is involved in the consideration of the ingredients which constitute a complete delivery, amongst which a leading, if not the controlling one, is to ascertain and determine both the acts and motives of the parties engaged in the transaction, (*Jackson v. Dunlap*, 1 Johns Cases, 114; 13 Pick. 69, 75,) and when the intention to deliver is not made out, the execution of a deed will not give it vitality and operation."

As to those who signed without any false representations, promises or pledges having been made to them, we are clearly of the opinion that the bond is of no binding force. Each man had a right to rely upon the fact which appeared before him on the bond, namely, that he was entering into a contract in which certain other men, whose names were there signed, were jointly bound with him. When they are discharged, it increases his liability, and in fact it is no longer his contract, and the contract which he supposed he was making.

In the case at bar, the man whose name first appears as surety would be discharged under the ruling as to the non-performance of promises, &c., and consequently each one that followed would be released. This must be the case, unless it was the special duty of each person who signed it to inquire and know for himself the terms and conditions, if any, upon which each preceding name was placed to the instrument. Whatever may be the rule upon this point, as between co-

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obligors, who sign a bond not negotiable, without the procurement of the obligee, it cannot be otherwise than as above indicated, where the signatures are procured by one who is acting as the agent of the obligee, or whose acts are afterwards adopted in that behalf, by said obligee. 2 Mumford, 33; 2 Bin. Rep. 195; 3 Randolph, 316; 3 Leigh's Rep. 590; *Barrington v. The Bank of Washington*, 14 Sergt. & Rawle, 405; 2 Pick. 24; 17 Mass. 591. }

On petition for rehearing.

PERKINS, J.—This was a suit against *Michael Batzner*, and some twenty-five other persons as his sureties, on *Batzner's* official bond.

The sureties answered *non est factum*. Trial by the Court. Judgment for plaintiff.

The plaintiff contends to sustain the judgment:

1. That the sureties executed the bond sued on.
2. That if they did not, they are estopped by the facts in the case, to deny its execution. The bond is not commercial paper.

It is not clear that the plaintiff could give evidence of the estoppel, it not having been replied; but we shall waive this point. The point as to the technical execution of the bill of exceptions was not made on the original hearing, either by Court or counsel, and will not be noticed now.

The bond was not executed by all the defendants. As to one, it was a simple forgery; and as to others, against whom judgment was rendered, though the bond was signed by them, it was never delivered. It was not delivered by them to the obligee, nor, absolutely, to any one else for the obligee, but, conditionally, to the principal in the bond, to be delivered to the obligee, only in the event of its being first signed by certain other persons. It was delivered as an escrow, if it could be thus delivered to a co-obligor. See *Berry v. Anderson*, at

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this term. As to some of the defendants, it must be admitted, no condition was imposed as to delivery, and as to some of them, the condition was not expressed with sufficient certainty to clothe it with the character of a contract. The question which we propose briefly to discuss is, were those defendants who signed the bond and delivered it conditionally to the principal in it, estopped to dispute its validity as to themselves, it having been delivered by the principal to the obligee, in breach of the condition?

It seems to be settled that an estoppel does not exist in such cases, at all events, where there are circumstances, in the given case, calculated to put the obligee on inquiry, or that may operate as notice of the imperfect condition of the instrument; for, in such case, the obligee does not stand as an innocent party; his own negligence is the proximate cause of the injury he sustains. *Passumpsic Bank v. Goff, et al.*, 31 Vermont, 315; *Swann v. The North British Australian Company, in the Exchequer Chamber, May, 1863*; 10 Jurist, (N. S.) p. 102; *The York County Ins. Co. v. Brooks*, and note, Am. L. Reg. vol. 12, p. 399; *Berry v. Anderson*, at this term. The estoppel will prevail, if at all, only as to an innocent party—a party ordinarily diligent.

The inquiry arises, then, was there negligence in this case, on the part of the obligee, or those acting for the obligee, in accepting the bond? Our code provides that, a person elected county treasurer, “shall, before entering upon the duties of his office, execute his official bond, with at least four freehold sureties, in a penalty of not less than double the amount of money which may come into his hands at any time during his term, by virtue of his office, to the acceptance of the county commissioners.” 1 G. & H., p. 640.

The code further provides, in an act on p. 160, 1 G. & H., that if it is discovered, after an officer enters upon his duties, that his bond is insufficient; or if it shall become so by reason

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of the removal, &c.; of any of his sureties, the principal may be summoned before the Judge of Common Pleas to improve the old or execute a new bond.

The 14th section of this act, p. 165, reads thus:

“Any officer required to execute a bond, as provided herein, in consequence of the insufficiency of the sureties, may procure other sureties, *to sign the old bond*, at the time set for hearing such petition, and if such judge shall deem such new sureties sufficient, no new bond shall be required, but such old bond, with the names of the new sureties subscribed thereto, shall be directed to be filed with the proper keeper of such bond; and such new sureties, shall be liable for all the official acts of such officer, from the original date of the execution of such bond; and such bond thus signed by such additional sureties, shall be valid against the principal, the original and new sureties, and all such sureties shall be jointly and severally liable, for the official acts of such principal, from the date of the original execution of such bond.”

These sections are public law, and those signing the bond in the case at bar, may be taken to have acted with a view to them.

Now, what do these sections import? Certainly that there is to be a sort of judicial investigation and approval of official bonds. Take the first section quoted. It is made the legal duty of the commissioners—

1. To fix the penalty of the bond, for it must be not less than double the amount of money, &c. The commissioners, then, must ascertain the probable amount of money, &c., and must then fix the penalty.

2. They must ascertain that there are not less than four freeholders among the sureties on the bond, and to do this, they should properly examine the persons themselves, because property is constantly changing hands.

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3. They must determine that the bond has been executed by those whose names appear to it.

4. They must decide as to the amount of property represented by the bond to satisfy themselves of its sufficiency. All these facts the public interest, as well as the law, requires that the commissioners should be satisfied about. Now, the passing upon these points necessarily involves a full investigation of the facts connected with the execution of the bond. Such an examination, the commissioners will be negligent if they do not make. Such an examination, those signing the bond in the case at bar, had a right to expect would be made, and the commissioners must be chargeable with knowledge of the fact. And public policy, as well as justice to all parties, requires that the decisions of Courts should be such as will tend to induce commissioners to discharge this statutory duty. It may occasion loss in a few instances of existing bonds, on making the first decision, but the loss will be the fault of the commissioners not of the law or Courts, and future losses will be prevented.

It would seem that the natural way of complying with the statute quoted, by commissioners, in approving bonds, would be to first fix the amount of the penalty; then approve, on investigation, a number of persons as sureties; then let the bond be drawn up in that penalty with the approved names inserted in the body of the bond, &c.; and, afterwards, when the bond should be presented, satisfy themselves of the genuineness of signatures, &c. This is the mode in which Courts approve administration-bonds, appeal-bonds, &c. There are then fixed rules of law to determine the binding obligation of the instruments. In this case, no such course was taken. The principal got up a bond according to his notion, not upon the approval of the commissioners, and went about soliciting names to it, not of those whom the commissioners had accepted, not freeholders or non-freeholders, and with

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nothing to guide the signers as to what would be the ultimate penalty, or who, or how many would be co-obligors. In such a state of facts what could signers do but make their own terms and conditions, knowing that, by law, all must be investigated, and might be changed on a hearing before the commissioners? That hearing and investigation it was the duty of the commissioners to institute, as they were bound to know. It was not instituted then, and, hence, may be now as to execution by each surety, and the consequence is, the county may suffer. The case of *Bibb v. Reid & Hoyt*, 8 Ala. p. 88, is directly in point, and, after much reflection, we are prepared to say, is, in our judgment, good law. We do not say that the same rule that applies to bonds taken pursuant to a statute, would apply in private transactions.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

L. Barbour, J. D. Howland, and Hanna & Quick, for the appellants.

Geo. Holland and C. C. Binkley, for the appellees.

GIBSON v. GREEN.

AWARD OF EXECUTION—PRACTICE—PERSONAL JUDGMENT.—Under section 406, 2 G. & H. 230, the Court may award execution upon an existing judgment upon constructive service of notice against the defendant, but can not render any personal judgment against them upon such notice.

PRACTICE IN SUPREME COURT.—Where a personal judgment is rendered upon default or constructive notice, and no steps are taken below to vacate it before an appeal to this Court, the appeal will be dismissed.

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APPEAL from the *Knox* Circuit Court.

PERKINS, J.—On the 29th day of *October*, 1841, *John McClure*, obtained judgment in the *Knox* Circuit Court, against *George R. Gibson* and *Samuel Emison*, for the sum of 812 dollars and 50 cents. On the 29th of *October*, 1841, *John McClure* assigned that judgment, on the order book of the Court, to *Robert G. McClure* and *James Johnson*, who, afterwards, viz: on the 15th of *February*, 1843, assigned, in like manner, said judgment to *William Green*, the plaintiff below. Afterwards, *Samuel Emison* departed this life, and *George R. Gibson* departed this State and became a resident of *Illinois*. No execution had been issued on the judgment; and on the 22d of *August*, 1861, *William Green*, the assignee of the judgment, as above stated, filed his complaint in the *Knox* Circuit Court, praying an award of execution thereon. Constructive notice was given of the pendency of the suit.

On the 21st day of *February*, 1862, a default was taken against the defendant; a finding made by the Court that the judgment was unpaid; a judgment rendered that the plaintiff recover the amount due of the defendant; and that execution issue, &c.

The defendant appealed to this Court; and claims that judgment could not be rendered against him upon construction notice.

The proceeding in the case was instituted under sec. 406, 2 G. & H. p. 230, which reads thus:

“After the lapse of five years from the entry of judgment, an execution can be issued only on leave of Court, upon motion, after ten days’ personal notice to the adverse party, unless he be absent, or non-resident, or can not be found when service of notice may be made by publication, as in an original action; or in such other manner as the Court shall direct; such leave shall not be given, unless it be established

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by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due."

The law in reference to judgments is a little peculiar, and it will not be out of place to epitomize it here.

A judgment of a competent Court, at common law, determines the right of a party, in a suit for the recovery of a money judgment, to the amount of money specified in the judgment, but does not put him in possession of it. The judgment merges the cause of action, constitutes a contract record, and becomes the highest evidence of legal right. Chit. on Cont. 2. It is an unimpeachable cause of action in a suit upon it. *Id.* 1 Blackf., 2d ed., 237; 11 Petersdorff, 689; 1 Chit. Pl., p. 111; and the English statutes of limitation formerly, at all events, prescribed no time within which an action must be brought upon all such domestic judgments. Arch. Pl., 24; Ang. on Limitations, 1st ed., 168. But the Court admitted lapse of time to be used as an item of evidence, raising a presumption of the fact that the judgment had been paid; when an action of debt was brought upon it; though the presumption might be rebutted by proof. Petersdorff, vol. 11, p. 699. The length of time upon which a judgment should be presumed when so sued upon, *prima facie*, to be paid, because fixed, at last, at twenty years, the time applied in case of specialties. This period was adopted in *Indiana*. *Barker v. Adams*, 4 Ind. 574; *Rogers v. Bishop, et. ux.*, 5 Blackf. 108.

The code of 1852 has gone farther. It has not only enacted, (vol. 2, p. 78. sec. 225; 2 G. & H. 165,) that, "every judgment and decree of any Court of record of the *United States*, or of this or any other State, shall be deemed satisfied after the expiration of twenty years." But it has also declared, in sec. 210, of the same vol., (2 G. & H. 159,) that actions "upon contracts in writing, judgments of a Court of record, and for the possession of real estate," shall be brought within twenty

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years "and not afterwards." Courts of justice of the peace are Courts of record in this State.

Actions of debt, however, are not usually resorted to upon judgments while the defendants remain or have property in the State where they are rendered, for such actions do not, of themselves, place in the hands of plaintiffs the fruits of the original judgment, viz: the moneys adjudged in them to be due. Those moneys, when not voluntarily paid, are obtained by executions. And, notwithstanding the judgments, when sued on, within twenty years, *prima facie*, entitled plaintiffs to judgments upon them without any proof on their parts of non-payment. Still, executions could not be issued upon them to enforce their collecting, after a year and a day, without leave of the Court, obtained after *scire facias*. But the writ of *scire facias* could not be issued in all cases, without preliminary steps. "At any time before seven years from the signing of the judgment, [says Petersdorff, vol. 14, p. 382,] it may be sued out as a matter of course; after seven years, and under ten, there must be a side bar rule; and after ten years, there must be a motion in Court, supported by an affidavit that the judgment is unsatisfied; 2 Salk. 598; 1. B. & B., 381. After fifteen years, it seems, the Court will grant only a rule *nisi*. Imp. B. R. 540. [In these cases, the Court will award an execution without personal notice to the defendant. It will be awarded on constructive notice; that is, at common law, upon two returns of *nil*, equivalent to two returns that no service can be had upon the defendant. Petersdorff, *supra*, 383; *Walker v. Hood*, 5 Blackf. 266;] but where the judgment was of twenty years standing, the Court of Common Pleas have required that the defendant should be actually summoned; 2 W. Bl. 995, 1140; "before execution should be awarded."

The object of the *scire facias* seems to have been to obtain, not a new judgment for the debt, but execution of the judg-

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ment already existing. How far, where the defendant actually appeared, or was actually summoned within the State, the award of execution might operate, under our code, to take the case out of the statute of limitations, is a question not now before us.

The proceeding provided for by the section of the code first above copied, seems to be a substitute for the common law writ of *scire facias*. Its object is to obtain execution upon an existing judgment; and if, in any case, a new personal judgment could be rendered against the defendant, it could not in this, because there was in it only constructive notice. *Beard et al v. Beard*, 21 Ind., p. 321.

That part of the judgment in this case, personal against the defendant, was unwarranted, but it was rendered upon default, and no steps were taken below to vacate before appeal to the Supreme Court. The appeal must therefore be dismissed with costs.

On petition for rehearing.

PERKINS, J.—A petition for rehearing has been filed on the point of dismissing the appeal. It is well said that the code gives the right of appeal from all final judgments, except, &c. But this Court will not reverse judgments appealed from, unless, as a general rule, the party has objected to errors below. See *Ellis v. Miller*, 9 Ind., 210.

If the Court should, as it might in such case, affirm the judgment, it would, probably, cut the party off from further relief. Hence, as a favor to him, the appeal is dismissed, and a door to remedy left open.

Per Curiam.—The petition for rehearing is overruled.

Gookins, Thomas and Roberts, for the appellant.

Samuel Judah, for the appellee.

Crassen v. Swoveland.

CRASSEN v. SWOVELAND.

MORTGAGE—WHAT CONSTITUTES.—Where *A* borrows of *B* a sum of money, and gives his note therefor, and at the same time executes a deed conveying certain real estate to *B*, reciting in the deed a consideration just equal to the note, and, at the same time *B* executes a bond to *A*, conditioned that, upon the payment by *A* of said note, he would reconvey said real estate to him, the facts, taken together, constitute *prima facie* a mortgage of the real estate by *A* to *B*.

PRACTICE—AMENDMENT.—An amendment of a complaint by leave of the Court, pending a trial, if the amendment added nothing to the material averments of the complaint, could not be a fatal error, nor, in such case, could the failure to re-swear the jury after such amendment.

PRACTICE—JUDGMENT UPON ANSWERS OF JURY TO INTERROGATORIES.—Where specific interrogatories are propounded to a jury to be answered by them unconditionally, and they seem to be so framed as to cover what appears to be the substance of the whole case, and they are fully answered by the jury, but the jury make no general verdict, the Court may well render judgment in accordance with such answers, because the course of the parties in the premises would fairly indicate an intention or consent to waive a general verdict.

CONTRACT—ACTION—MORTGAGE.—Where *A* borrows money of *B*, and executes his note to *B*, and by deed conveys certain land to him, and takes from *B* a bond to re-convey the land on payment of the note, such transaction amounts *prima facie* to a mortgage, and if *B*, said bond not being recorded, sells and conveys said land to *C*, without notice of the nature of said transaction, for a sum much larger than the sum borrowed, *A* will be entitled to recover of *B* the difference between said sums.

VENDORS AND PURCHASERS—NOTICE.—Possession of real estate is only constructive notice to all the world of the rights of the party in possession; but it is held that the continued possession by the grantor of land after the making of his deed, will not be notice of a defeasance held by him which is not recorded.

Crassen v. Swoveland.

APPEAL from the *Blackford* Circuit Court.

WORDEN, J.—On the 20th of *March*, 1858, *Benjamin Swoveland* borrowed of *Elliott Crassen* and *Equa Crassen* the sum of about 183 dollars, for which he gave them his promissory note for the sum of 200 dollars, payable in sixty days. At the same time *Swoveland* executed to the *Crassens* a conveyance in fee simple for eighty acres of land; the conveyance reciting that it was for the consideration of 200 dollars. At the same time the *Crassens* executed to *Swoveland* a bond in the penalty of 500 dollars, conditioned as follows:

“The condition of the above obligation is such that whereas the said obligee has this day purchased of *Elliott Crassen* and *Equa Crassen* the following real estate, (here the land is described as in the deed from *Swoveland* to the *Crassens*,) for the sum of 200 dollars, on the following terms, to-wit: one note of hand to be paid in sixty days from the above date. Now if, upon full payment of said purchase money, without any relief from valuation or appraisement laws, according to the tenor and effect of said promissory note, we shall make and deliver a good and sufficient deed of conveyance in fee simple for said real estate, then the above obligation to cease and be void, otherwise to be in full force,” &c.

After the transaction above stated, the *Crassens* sold and conveyed the land to one *Mordecai Whitney*, for the sum of 1,000 dollars.

This action was brought by *Swoveland* to recover from the *Crassens* the amount thus received by them from *Whitney* for the land, less the amount due them from *Swoveland* for the borrowed money.

That is what the plaintiff recovered, and we think the complaint, although objection was made to it by demurrer, was sufficient to authorize such recovery. Copies of the deed and bond were set out. Objection is made that the amount due from *Swoveland* to the *Crassens*, for the borrowed money, was

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not brought into Court. If the complaint were for a redemption of the land merely, the objection might require examination, but as that was so framed as to authorize a recovery of the money from the *Crassens*, it was not at all necessary for that purpose that *Swoveland* should bring into Court what he owed them.

Certain evidence was objected to on the trial, having for its object to show that the transaction was a mortgage, as that it was the intention of the plaintiff that it should operate only as a mortgage.

This testimony was harmless, if not legitimate. The transaction, including the borrowing of the money by *Swoveland*, the giving of his note, the execution of the deed by him; and the execution of the bond by the *Crassens* for a reconveyance upon the payment of the money, amounts, in law, *prima facie*, to but a mortgage. 1st Washburn on Real Prop. 494, sec. 18; *Watkins v. Gregory*, 6 Blackf. 119. Even illegal evidence that a thing was intended to be what it really is, could do no one any harm.

On the trial the Court permitted the plaintiff to insert, as an amendment to his complaint, an allegation to the effect that the deed and bond were designed as a security for the payment of the money and intended to operate as a mortgage. This amendment was objected to, and especially that the jury were not re-sworn. The amendment added nothing to what already appeared, as on the face of the papers, they amounted to only a mortgage, hence the permission so to amend, or the failure to re-swear the jury, could not be a fatal error.

The evidence is not before us, but the special answers of the jury to interrogatories, we here set out at large:

"1st. Did *Swoveland* borrow any amount of money from the *Crassens*?

Ans. He did.

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2d. If *Swoveland* borrowed money from the *Crassens*, how much did he so borrow?

Ans. He borrowed 183 dollars and some cents.

3d. Did *Swoveland* execute to the *Crassens* a note?

Ans. He did.

4th. If so, how much was the note for?

Ans. He executed a note; amount, 200 dollars.

5th. Did the *Crassens* hold *Swoveland's* note after the making and delivery of the deed by *Swoveland*?

Ans. They did.

6th. Did the *Crassens* hold the indebtedness for which the deed was made against *Swoveland* after the execution of said deed and bond?

Ans. They did.

7th. Do not the *Crassens* yet hold the note against *Swoveland* for which the deed in controversy was made?

Ans. They do.

8th. Was the deed in controversy intended as a security for the payment of the money received from the *Crassens*, or was it executed for the purpose of operating as an absolute and unconditional, or a conditional conveyance?

Ans. The deed was given as security for the payment of the money borrowed from the *Crassens*.

9th. Were the deed and bond named in the complaint executed at the same time?

Ans. The bond and deed were made at the same time.

10th. What was the difference between the amount of money received from the *Crassens* and the note given?

Ans. The amount was 17 dollars, nearly.

11th. Was there more than 6 per cent. interest included in the note given by *Swoveland* to the *Crassens*?

Ans. There was more than 6 per cent. included.

12th. For what amount did defendants sell the land to *Whitney*?

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Ans. 1,000 dollars."

The defendants ask that the following interrogatories be answered by the jury:

"1st. If any amount of money was included in the note of 200 dollars, above the sum actually paid to *Swoveland* by the *Crassens*, was it for interest, or was it for the trouble and expense of the *Crassens* in procuring the money for *Swoveland*?

Ans. The amount was for interest and expenses.

2d. Were the deed and bond executed to operate as a mortgage, or was the deed to operate as a sale and conveyance of the land in case the note was not paid at the end of sixty days?

Ans. To operate as a mortgage.

3d. Did *Swoveland* tender to defendants, or either of them, the amount of the note, or any other amount, on the day the note became due? (Ans. No.) Or at any other day, if so, when?

Ans. There was a tender made before suit was commenced.

4th. Has any sum of money been paid into Court since the commencement of the action, for the purpose of paying the note?

Ans. There was no money paid into Court since the action commenced.

5th. Have the *Crassens*, after the note for 200 dollars became due, and before the commencement of this action, for a valuable consideration, conveyed the land in controversy to *Mordecai Whitney*, and, if so, had *Whitney*, either before or at the time of the conveyance, any notice that *Swoveland* had any claim upon the land, and, if so, what was the notice?

Ans. The *Crassens* sold the land after the note became due, and *Whitney* had no notice of *Swoveland* having any claim on the land at the time of sale.

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6th. What was the cash value of the land at the time of the conveyance to the *Crassens*?

Ans. 650 dollars.

7th. In whom was the title of the land at the commencement of this action, and in whom is it still?

Ans. The title was in *Swoveland*, and is still.

8th. Who has paid the taxes since the conveyance to the *Crassens*, and what amount has been paid?

Ans. The *Crassens* paid the taxes.

9th. Who has possession of the land, and rents and profits?

Ans. *Swoveland*.

10th. Have the *Crassens* been guilty of any fraud in procuring the deed, bond and note, and were the papers executed by the parties in any thing different from what they were intended at the time?

Ans. No.

11th. Who was in possession of the land at the time *Whitney* bought it.

Ans. *Swoveland*.

12th. What amount of money was tendered the defendants by the plaintiff, and when made?

Ans. 200 dollars; before suit was commenced."

There was no general verdict, and the question arises, whether the answers of the jury to the foregoing interrogatories are sufficient to sustain the judgment of the Court? The mere fact that there was no general verdict, we think, unimportant, inasmuch as the parties seem, by the course which they pursued, to have waived it. The parties did not ask to have their special questions answered in the event only of there being a general verdict, but unconditionally; and the special questions are so framed as to cover what seems to be the substance of the whole case. We think, from the course pursued, the parties were content to waive a general verdict, and rest their case upon the answers which the jury might

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give to the questions thus propounded to them; hence they can not complain that there was no general verdict.

We think the proposition is a very clear one, the transaction between *Swoveland* and the *Crassens* having the effect only of a mortgage, that, if the *Crassens* sold and conveyed the land to *Whitney* for 1,000 dollars, the purchase money being paid, and *Whitney* having no notice of *Swoveland's* claim, whereby *Whitney* would be enabled to hold the land, the *Crassens* are liable to *Swoveland* for the amount thus received by them, less the amount he owed them. This must be so on the plainest principles of equity. The *Crassens*, in respect to the matter, may be regarded as the trustees of *Swoveland*, and liable to account to him for whatever they have received, without making any profit to themselves. 1 Story's Eq., sec. 465. Where a sale is made of land by a mortgagee under a power, he holds the proceeds, after satisfying the mortgage debt, as a trustee for him who is entitled to the equity of redemption. 1st Washburn on Real Estate, 500. We are not prepared to say that *Swoveland* might not ratify the sale and hold the *Crassens* liable for the amount received by them, even if *Whitney* have notice, but this point is not necessary to be decided.

Taking the special answers of the jury as an entirety, they show, as we think, such a state of facts as would enable *Whitney* to hold the land as against *Swoveland*. It is found that the *Crassens* sold the land to *Whitney* for 1,000 dollars. The inference is that the money was paid down, as there is no finding, nor was any question put, as to there being a credit for all or any part of it. It is also found that *Whitney* had no notice of *Swoveland's* claim. The fair interpretation of this finding is that *Whitney* had no actual notice, nor such constructive notice as would arise from a recording, within the proper time, of the bond, which operates as a defeasance. If *Whitney* had notice, either actual or constructive, he would have had notice, and this would contradict the finding.

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But it is claimed that as it was found that *Swoveland* was in possession of the land at the time *Whitney* purchased it, this was constructive notice. As a general proposition, the doctrine that possession of real estate is constructive notice to all the world, of the rights of the party in possession, is conceded. But the doctrine has no application to the case before us. We take it for granted that the bond which operated as a defeasance, was not recorded so as to constitute a constructive notice to *Whitney*, for two reasons: 1st. There was no finding that it was so recorded; and, 2d. The jury have negatived any notice, which includes constructive as well as actual notice. Our statute on the subject of registry, provides that: "When a deed purports to contain an absolute conveyance of any estate in lands, but is made, or intended to be made defeasible, by force of a deed of defeasance, bond, or other instrument for that purpose, the original conveyance shall not thereby be defeated or affected, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law, within ninety days after the date of said deed." 1 G. & H. p. 261, sec. 17. This statute, it will be seen, requires actual notice, to defeat a purchaser, where the defeasance has not been duly recorded. Possession has never been held any thing more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: "Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him, which is not recorded." 1 Wash. on Real Prop. p. 495, sec. 22. The case of *Hennesy v. Andrews*, 6 Cush. 170, is directly in point, under a statute similar to our own.

The fact, then, that *Swoveland* was in possession of the land

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at the time *Whitney* purchased it does not seem to effect the rights of the latter in the least.

But the jury found that at the commencement of the suit the title to the land was in *Swoveland*, and is still in him. There is some apparent inconsistency between this and the other findings. We have already seen that there were findings abundantly sufficient to show that the title was in *Whitney*. We are inclined to regard the finding, as to the title being in *Swoveland*, as a conclusion of law drawn by the jury from the fact that the deed and bond amounted to a mortgage only, and not an absolute conveyance. If the jury erred in that conclusion, that is no sufficient reason why the findings, taken together, should not authorize a judgment for the plaintiff.

The appellants insist that the Court erred in not allowing them credit for the amount of taxes paid by them. There was a very good reason for not allowing them, which was that no data were furnished to enable the Court to make the allowance. The jury did not find how much the appellants had paid for taxes. The appellants asked, to be sure, that the jury find what amount of taxes had been paid. If there was no evidence before the jury to show the amount, the appellants had no right to expect the question to be answered. If there was evidence they should have insisted upon an answer to the question; as they did not, they waived it.

The case seems to have been fairly tried upon its merits; the judgment is right in principle, and we think there is no error in the record which requires a reversal.

The appellee has assigned a cross error upon the refusal of Court to allow him interest upon his claim against the *Crassens*. Without stopping to inquire whether it was a case in which interest should have been allowed, we may dispose of this question on another ground. There was nothing found by the jury, as in the case of the taxes, which would enable the Court to determine the amount of the interest. When

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the *Crassens* received the money, does not appear from any finding of the jury, except that they sold the land after the note became due and before commencement of this suit; hence the amount of interest which they should pay could only rest upon conjecture. The appellee seems to have been aware of this difficulty, for in his motion on this subject, he asked the Court to allow him interest on the money "from the time of the sale as shown by the evidence." The cause having been tried by a jury, we know of no practice that would authorize the Court to look partly to the verdict, and partly to the evidence for a basis on which to render judgment. No error was committed in overruling the motion.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages, and costs.

Walter March, for the appellants

J. Brownlee, for the appellee.

SANDERS v. COOK.

EXECUTION—INJUNCTION.—*A* recovered a judgment against two persons. The property of one has passed by purchase, under a junior lien, to another person, and the property of the other to another person by purchase. *A* seeks to enforce payment of the judgment by levy and sale of the property of the former, who seeks to enjoin the sale thereof until the property of the latter shall have been exhausted.

Held, that such sale ought not to be enjoined, because the principle of equity, authorizing the marshaling of securities in certain cases, does not apply in such a case.

APPEAL from the *Bartholomew* Circuit Court.

Sanders v. Cook.

HANNA, J.—This was a proceeding to enjoin a sale of certain lands on execution. Injunction granted.

It appears by proper averments in the complaint, by the appellee, that on the 21st day of *April*, 1857, one *Sinker* recovered a joint judgment against *Barnes*, *Wonderly*, *Witt*, *Davis*, *Witt*, *Norton* and *Whippe*, for, &c., which was, on *August* 23d, 1860, assigned to said *Cook*; that on the 28th of *July*, 1862, an execution was issued on said judgment, and levied on the property in dispute, as the property of said *Barnes*, and the sheriff threatens, &c.; that on the 2d of *January*, 1858, one *Spaugh* sued out an attachment against the property of said *Barnes*, which was levied upon said real estate as the property of said *Barnes*; that on the 24th of *January*, 1859, judgment was recovered by said *Spaugh* against said *Barnes*, and an order for the sale of said attached property; that in pursuance thereof, said land was, on the 3d day of *December*, 1859, sold to *Spaugh*, who, on the 20th day of *February*, 1860, sold the same to the complainant; that none of said named defendants, in the prior judgment, had any property subject to execution, except said *Barnes* and *Wonderly*; that the latter had, until the 1st day of *January*, 1861, property in said county amply sufficient to pay said debt, to-wit: real estate; that in 1861 or 1862, *Barnes* died utterly insolvent. Prayer that the said property of *Wonderly*, and any other property of said *Barnes*, subject to said execution, may be first resorted to.

A demurrer to the complaint was overruled. It assigned for cause that *Wonderly* ought to be made a party, and that it did not state facts sufficient, &c.

An answer was filed, showing that several executions had issued, and been levied upon various articles of personal property, after the rendition of the judgment, and before the property was seized under the attachment, and that said *Sinker* and the said *Cook* used due diligence to collect said

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debt; that prior to the issuing of said attachment, the defendants in said elder judgment had, among themselves, made an agreement, by which said *Barnes* was to pay the same, the other defendants paying him their contributive share; that *Wonderly* has no property subject to execution, other than the lands described, which he transferred on the 1st of *January*, 1861, to a purchaser. Then it appears that the said *Sinker* judgment was a lien on property of *Barnes* and *Wonderly*, and the question is, to the property of whom shall the holder of said judgment resort for satisfaction thereof. The property that was owned by *Barnes* has passed to a purchaser under a junior lien—the plaintiff in this case; that of *Wonderly* has passed to a third person by purchase.

The ground upon which the appellee claims relief is, that as the plaintiff in the *Sinker* judgment had a lien upon the property of both *Barnes* and *Wonderly*, either of which was sufficient, and *Spaugh* had a lien, which he had enforced, upon that of *Barnes* only, therefore the former should be compelled to resort to that which the latter could not reach. This is placed upon the ground that the holder, under the *Spaugh* judgment, is an innocent purchaser. This would be in accordance with the rule in equity, that where one creditor could look to two funds of a debtor, and another creditor could look to but one of said funds, the former might be compelled to exhaust that which the latter could not reach before he could seize upon the other, which the latter could reach. We say the relief prayed would be in accordance with this equitable doctrine, if the same is applicable to the facts stated. But it is not, for the reason that in this instance there was not a common debtor against whom different creditors had claims, which must be the case to entitle either to have the securities or funds marshaled. It is said that "this may be illustrated by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one

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of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a judgment against his own several debtor, a Court of equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor. At least it will not do so, unless it should appear that the debt, though joint in form, ought to be paid by one of the debtors only, or there should be some other supervening equity." 1 Story Eq. sec. 642.

The case at bar falls exactly within the proposition here stated. It does not appear that *Wonderly* should pay the debt rather than *Barnes*, as between themselves. In the answer the reverse is averred. But one thing is shown which has the semblance of a supervening equity, and that is, the death and insolvency of *Barnes*. This we do not look upon as sufficient to authorize interposition. The purchaser, under the attachment proceedings, took his chances in regard to the prior lien that is now being enforced. And he can not be regarded as an innocent purchaser, in the legal sense of that term, for the law made the record of the senior judgment constructive notice to him and all others. It must be supposed that he looked to the fact that the holder of that lien had a right, by virtue of his contract so far as was shown, to proceed against the property of either or both of the joint debtors, until he was satisfied. And we do not discern any laches upon his part by which he has forfeited that right. Nor do we see that he can be compelled by one, not a creditor of the common debtor, to surrender any of his rights under his contract, because one of his debtors may have become insolvent.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Francis T. Hord, for the appellant.

Ralph Hill, for the appellee.

Perry v. McEwen:

PERRY v. McEWEN.

TRUST—FORFEITURE—INJUNCTION.—Where a lot is conveyed to trustees of a religious society, for the use of such society, according to the discipline, &c., and the society erect a church building thereon, and the trustees lease the basement thereof, which was made for a prayer room, to a teacher of a common day school, with leave to him to change the internal arrangements of the room to adapt it to his business, such trustees may be enjoined, on the application of members of the society, from such leasing.

APPEAL from the *Bartholomew* Circuit Court.

PERKINS, J.—In 1854, *John F. Jones* and *Catharine*, his wife, of *Columbus, Indiana*, executed a conveyance of a lot, in said town, to *William McEwen* and others, trustees and their successors, &c., “in trust for the uses and purposes named in said deed,” which were, “for the use of the members of the Methodist Episcopal Church in the *United States*, according to the discipline, &c., of the general conference, in which church on said lot, at all times, the ministers thereof shall be permitted to preach and expound God’s holy word,” &c.

Money was subscribed, and a church building erected on the lot, costing some 7,000 to 8,000 dollars, of which sum said *McEwen* contributed 1,500 dollars. The building has a basement story on the ground, fitted up for prayer meetings, and regular church service in inclement weather, having a pulpit, seats, &c., and being neatly papered, &c.

This basement story, the trustees of the church leased for a term, to the teacher of a day common school, authorizing such changes to be made in the internal arrangements of the room, as would make it convenient for use as such common school room. *William McEwen*, above named, applied to the Circuit Court for an injunction restraining the trustees and teacher from converting said church room to use as such common school room.

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A perpetual injunction was granted.

The grant, in this case, was not a general one, of property to the society, without designation of use. Had it been, we should have had no difficulty in the premises. As it is, after considerable reflection, with some hesitation, we have concluded that the judgment below must be affirmed.

It was held in *Broadway v. The State*, 8 Blackf. 290, that the occasional abuses of the use of trust property did not occasion a forfeiture of the property. But the question of forfeiture is one, and that of the right and duty of a Court to restrain such abuses is another. And in the case at bar, the property was diverted in a way contemplating permanency. The property, in this case, was conveyed to be used for a particular purpose. Now, if it is held that there may be a departure from that purpose, who shall limit such departure? Suppose the house had been leased for a saloon, a billiard room, or the like, this would have been restrained. Suppose for a school to teach Atheism; or to teach doctrines simply adverse to the creed of Methodism; if any departure from the trust in the use of the property is allowed over objections by members, what are the departures that are to be allowed? See Hill on Trustees, Am. ed., p. 699, note; *Scott v. Stipe, et al.*, 12 Ind. 74.

Per Curiam.—The judgment below is affirmed, with costs.

Thomas A. Hendricks, Oscar B. Hord, J. E. McDonald, and A. L. Roache, for the appellant.

Francis T. Hord, M. M. Ray, and C. E. Walker, for the appellee.

Potter v. Sumner.

POTTER v. SUMNER.

PLEADING.—A mortgagee, where the mortgaged property has been sold at sheriff's sale, upon a judgment fraudulently procured in favor of another person, may institute his action to set aside the sheriff's sale, without, at the same time, suing for the foreclosure of his mortgage, and his mortgage, or a copy of it, need not, in such case, be filed with the complaint.

APPEAL from the *White Circuit Court*.

HANNA, J.—This was a proceeding to set aside a sheriff's sale of lands. The complaint was filed by *Sumner*, a junior incumbrancer, and charges that *Jones*, one of the defendants below, sold said lands to one *Walden*, and took a mortgage to secure the purchase money, and afterwards obtained a judgment and decree of foreclosure thereon for, &c.; that after the purchase by *Walden*, and previous to the said foreclosure, said *Walden* and wife executed a mortgage to secure the repayment of 1,000 dollars to said *Sumner*; that *Walden* appealed from said decree to the Supreme Court, during the pendency of which said *Potter* purchased said land of said *Walden*, for 2,800 dollars; that by the terms of the contract of purchase, he was, among other things, to pay said decree to *Jones*, and said *Walden* was to dismiss said appeal, which he did; and was to pay the debt of said *Sumner*, of which arrangement he was informed by said *Potter* and said *Walden*; that afterwards said *Potter* and *Jones* fraudulently combined to cheat said *Sumner*, and caused an order of sale to be issued, and said land sold thereon, from said decree, and said *Potter* became the purchaser at about 200 dollars, and claims to hold said land clear of said junior's lien; although he had repeatedly represented to plaintiff that said decree was satisfied, and that he was to pay plaintiff's debt. Prayer that the sale be set aside as fraudulent.

Demurrer to the complaint overruled.

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Two objections are taken to the complaint: 1st., that the mortgage to *Sumner*, or a copy of it, does not accompany the complaint. 2d., that he did not seek the proper remedy. It is insisted that the suit is founded on the mortgage, and the remedy sought should have been its foreclosure and a decree for the amount due thereon.

Evidently, it was the intention of the pleader, in the case at bar, to procure an order setting aside the sale. If it had been his purpose to obtain a judgment for the amount of his debt, and to foreclose his mortgage, he would have made the mortgagor a party. This he did not do. He does not show that he desired a judgment for his debt; but that he wanted to clear away certain proceedings and evidence of title, which he alleges were in fraud of his security, which he held for the ultimate repayment of his claim. It is, perhaps, true, that unless he held a valid debt, &c., against *Walden*, he could not have proceeded in the manner he attempted. But it appears to us that the purpose of the suit, the gist of the action, was to get rid of the effect of the alleged fraud, by which *Potter* was absorbing the property, which otherwise would be subject to the debts of *Walden*.

Without doubt, in addition to the amounts in this complaint and the remedy prayed, the complainant might have sought the collection of his debt, in the same proceeding. But we do not think he was obliged to do so, or fail in that for which he does ask relief.

Per Curiam.—The judgment is affirmed, with costs.

H. W. Chase and *J. A. Wilstach*, for the appellant.

D. Mace and *W. C. Wilson*, for the appellee.

Gifford v. Black.

GIFFORD v. BLACK.

VOLUNTARY ASSIGNMENT—CLAIMS AGAINST ASSIGNEE.—The proceedings for the collection of claims against the estates of decedents, and of claims against the estates of voluntary assignors are so similar, that, wherever the rules touching the former are applicable, they should govern in relation to the latter, and the formation of issues on such claims, either of law or fact.

APPEAL from the *Orange Common Pleas*.

HANNA, J.—Since the adoption of the statute of 1859, Acts 1859, p. 239, one *John W. Payne*, in pursuance of said statute, made a voluntary assignment, in trust for the benefit of his creditors, *Black* being the trustee. About a year afterwards, the trustee having refused to allow one of the claims designated in the indenture, it was placed upon the issue docket, and another creditor demurred thereto, which was sustained. From this ruling the appeal is prosecuted, by the creditor.

There does not appear to have been any formal complaint filed in favor of the defeated claimant—the appellant. The claim was a note executed by *Jonathan Payne, Joseph Cox, William Johnson* and *Solomon Dill*.

There is an affidavit attached thereto, in which it is alleged that *Payne & Cox*, as partners, borrowed money of the appellant, and executed said note with *Johnson & Dill* as sureties; “that afterwards said *Payne* and *John W. Payne* bought out the interest of said *Cox*, and assumed the payment of said note; and afterwards said *John W.* bought out the interest of said *Jonathan*, and assumed to pay the said debt.” It is alleged that in each case said assumption was a part of the consideration of the purchase. It is not averred whether the assumption, or agreement to pay this debt, was in the first place made by *John W.* with *Payne & Cox*, makers of said note, or with the appellant, or with all parties interested.

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There is an absence of like averments as to the second alleged arrangement.

The statute under which these proceedings were all had is so similar in its prominent features to those in reference to the settlement of decedent's estates, that it is apparent the same theory of proceeding in each case was intended so far as applicable. A bond and oath are exacted of an administrator, so of a trustee; property is to be appraised and sold by the former, and likewise by the latter; claims of creditors are filed to be allowed in each instance; if not allowed by the administrator they are then transferred to the issue docket of the Court for trial as other civil actions thereon; if not allowed by the trustee, or if another creditor objects to such allowance, the Court may order such case to stand for trial which shall be governed in all respects, by the rules regulating similar trials in the Circuit Court; an affidavit is filed with the claim against a decedant's estate to the effect that the same is justly due and wholly unpaid, and against a trustee that the claim is just and lawful, and no part for usurious interest, or if so, what part.

In adjudicating upon the statute in reference to decedent's estates, it has been held that filing a claim and placing it upon the appearance, and then upon the issue docket, is a mode of getting it into Court to receive final adjudication, as in a suit at law; and that such facts can be pleaded in bar of an action commenced upon the same claim; pending the determination of said proceedings. *Morgan v. Squire*, 8 Ind., 512. It has also been held that an executor can not allow a claim to himself for a debt due from the decedent, but must resort to adversary proceedings. *Hubbard v. Hubbard*, 16 Ind. 27.

These cases appear to settle the principle, as to proceedings on claims against decedent's estates, that the filing of a claim in pursuance of the statute, is the initiation, or perhaps the

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preliminary step towards the initiation, of a regular suit; and that in such suit there must be adversary parties, that the merits may be developed.

If this is correct, then it would appear to follow that to direct, limit and confine the evidence and investigation to the real points in dispute, such points should be sharply presented; that is, issues should be made at some time prior to the period at which the evidence is heard. This can only be done by the pleadings. Of course such pleadings should substantially correspond with the rules upon that subject, which may prevail in regard to the system that may be in force at the time. This must be correct, in view of the fact that such controversies are to be tried as other civil actions.

The substantial similarity of these statutes, in reference to the settlement of the estate of a decedent, and the proceedings of a trustee under an assignment, compels us to the conclusion that very similar rules should prevail in the latter class of cases to those that maintain in the former. Then if the presentation of facts made by a claimant are not sufficient, if proved, to entitle him to have his claim allowed, we suppose a question of law may be made thereon; and we know of no simpler mode of testing that point than by a demurrer.

In the case at bar, even if the affidavit filed with the note can take, and supply, the place of a complaint, still, it does not show facts sufficient to make a case in favor of the appellant. The averments are not specific enough in relation to the facts upon which it is asserted that *John W.* assumed to pay to said appellant the debt of *Payne & Cox*, or a sum equivalent thereto. No question is made as to the right of an objecting claimant to demur.

Per Curiam.—The judgment is affirmed, with costs.

A. J. Simpson, for the appellant.

James Collins, Thomas L. Collins and Alfred B. Collins, for the appellee.

Gardner v. Brown.

GARDNER v. BROWN.

SHERIFF'S LIABILITY FOR PRINTER'S FEES.—A sheriff is not personally liable for printer's fees for advertising, simply because he officially hands the advertisement to the printer, in the absence of special contract. The printer's fees may be collected as part of the costs in the case. And as the fee bill in the code does not fix the amount of expense the sheriff may incur for advertising, the Court may do so, under the provisions in 1 G. & H. p. 338.

APPEAL from the *Daviess* Common Pleas.

PERKINS, J.—*Gardner*, assignee of *Lewis*, publisher of the *Washington Conservator*, sued *Brown*, the sheriff of *Daviess* county, on an account of 16 dollars for advertising three sheriff's sales.

The sales were advertised without any special contract with the sheriff. The fee for advertising was taxed in the costs, but had not yet been collected.

The Court below found for the defendant. The statute fixing costs, &c., is defective in not providing a fee for notices by publication. At least, we have not found any such provision.

But the code does provide, (1 G. & H. p. 338,) for the taxation of costs by the Court, and that "whenever there shall appear a claim for official services rendered by any officer of a Court of justice, and there does not appear to be any fees fixed by law as a compensation therefor, the Court, judge or justice, on application, shall make an order specifically fixing the allowance for such claim."

Now, the statute, (2 G. & H. p. 249,) requires sheriffs to advertise sales of real estate in a newspaper, if there be one in the county willing to publish such advertisement, and authorizes him, thereby, to incur that expense; but, as the fee bill in the code does not fix the amount of the expense, the Court may do so.

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It is analogous to the case of an allowance to the sheriff for keeping property attached, &c. See *Jones v. Thomas*, 14 Ind. 474.

The sheriff, however, will not be personally liable, unless he makes himself so by contract specially. The printer's fee will be a part of the costs, and collectable as such. If it should be lost by any negligence on the part of the sheriff in failing to have it taxed, or otherwise, he might be liable on that ground; or if he should collect it and fail to pay it over, he might be liable for money had and received, &c. But he would not be liable on the contract for advertising simply upon the fact that he had officially handed the advertisement to the printer.

Per Curiam.—The judgment below is affirmed, with costs.
J. W. Burton, for the appellant.

THE INDIANAPOLIS AND CINCINNATI R. R. Co. v. BALLARD et ux.

PLEADING—SET OFF.—A claim arising out of tort can not be set off against a demand arising out of contract.

APPEAL from the *Decatur* Common Pleas.

PERKINS, J.—This was a suit upon a note and mortgage, with prayer for foreclosure, &c.

The defendants answered in three paragraphs, each purporting to go in bar of the whole action, and each alleging a defence by way of set off.

The first paragraph alleged that the plaintiff, by its machinery, killed a cow, the property of the male defendant, of the value, &c., on the railroad where it was not but might have been fenced, &c.

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The second paragraph alleged that the plaintiff killed another cow of the male defendant, of the value, &c., on her road, where it could not be fenced, by negligently, &c., running over the cow.

The third was like the second, but for a differently described, and actually different cow.

The Court overruled a demurrer to each of these paragraphs, and, on the trial, admitted evidence under them touching the killing, by the railroad company, on its road, of three cows of the male defendant; one without carelessness, where the road was not, but could have been fenced; the other two, by carelessness and negligence, on the road where it could not be fenced.

The jury allowed for the cows, or one of them, killed by negligence, in their verdict, and the Court, also, in the judgment given in the cause. The price of the cow killed without negligence, where the road was not, but might have been fenced, was also allowed.

The question is, were the set offs all properly admitted in defence in the foreclosure suit?

If they were, then our code differs, on this point, from the law of every other State in the Union, and from that of Great Britain. Can causes of action in tort be set off against causes of action on contract? We have found no precedent for it. We have examined the latest codes.

The *Iowa* Code of Pleading and Practice of 1860, provides as to set off, that, "a set off can only be pleaded in an action founded on contract, and must be a cause of action arising on contract, or ascertained by the decision of a Court." Sec. 2886, p. 524.

The code of *Kansas*, 1862, adopts the above section literally. Sec. 106, p. 141.

In *Minnesota*, set off seems to be included within the term, counter claim; though, perhaps, an answer of set off might

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be sustained in case of cross-demands on contract. The counter claim, in that State, must be an existing one in favor of the defendant, and against the plaintiff, &c., and arising out of the following causes of action :

1. Arising out of or connected with the subject of the action in the given case.

2. "In an action arising on obligation, [the counter claim may be,] any other cause of action arising on obligation, and existing at the commencement of the suit." This clause embraces customary set offs. Statutes of Minn. p. 544, sec. 77.

This provision was adopted literally from the *New York* code, where the old right of set off is still recognized. Voorhies' Code 1859, p. 81.

In *Pennsylvania* all set offs are given under a plea of payment, or may be so, and, while the statute of that State is considered as perhaps among the most liberal in allowing such defences of any in the Union, still, in that State, the matters must arise out of contract. Purdon's Digest, by Brightly, 1861, p. 331.

We find nothing, then, in the progress of legal reform, indicating that past experience has led to the belief, in the legal world generally, that the set off of torts against contracts would be judicious.

As to how it might be in particular instances of counter claim, we are not now called on to say. Counter claim, under our code, has several points of difference from set off.

In view, then, of the practice in all countries where the common law has prevailed, let us examine and interpret our code on this point.

It provides that a set off must consist of matter of defence, legal or equitable, liquidated or not, held by the defendant at the commencement of the suit, and due at the time of trial, "arising out of a debt, duty or contract." 2 G. & H. p. 88.

It is claimed that every right to damages for a tort arises

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out of the duty of the wrong doer to pay damages, and, hence, that such damages may be answered by way of set off.

But, we think this proposition is founded in too broad a definition of the word duty, as used in the statute referred to. Indeed, the word, duty, has no known legal signification, as used in the statute of set off, or as defining a cause of action. See the definition of the word duty in the dictionaries. What was meant by it, as used, is not evident to a man of common understanding. But we think it should be held to relate to causes of action, arising *ex contractu*, upon implied obligations, and such as may arise by operation of law, &c.; see 1 Par. on Cont. p. 4; and not to those arising *ex delicto*, unless where the tort may be and is waived, and implied assumpsit relied upon. Perhaps, in this latter class of cases, set off might be made available. We think such should be the sense given to the word duty in the statute of set off, for the following among other reasons:

1. It is used in connection with other words relating alone to causes of action arising *ex contractu*, both on the page above cited from G. & H., and on p. 98 of the same volume, where joinder of causes of action is treated of; and it is a well known maxim of the law that where the meaning of a word, as used, can not be determined from considering the word itself, a meaning may be assigned to it from those with which it is associated. "*Noscitur ex socio, qui non cognoscitur ex se.*" Moor. 817.

2. The law of set off as previously existing corresponds with the view we are taking of it under the present code. In the R. S. 1843, p. 708, sec. 204, the character of a demand that may be set off is thus described:

"It must be a demand arising upon judgment, or upon a contract, express or implied, whether such contract be written or unwritten, sealed or without a seal; and if it be founded upon a bond, or other contract having a penalty, the sum

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equitably due by virtue of the condition only shall be set off," &c. And, on p. 709, of the same volume, set off in cases of actions by trustees, executors, &c., is provided for.

3. Our present code provides that, "set off shall be allowed only in actions for money demands upon contract;" 2 G. & H. p. 88, sec. 57; and it defines an action for a money demand on contract to be an "action arising out of contract, where the relief demanded is a recovery of money." 2 G. & H. p. 386. Now, set off is but a cross action; and if it can only be allowed where the original action is founded on contract, it would seem, both on the ground of mutuality, and upon the reason of the thing, that the set off, the cross action, must also be founded on contract. Otherwise this inconsistency is presented. If, in the case at bar, *Ballard* had commenced suit against the railroad company for killing his cows, it would not have been an action founded in contract, and, hence, the cause of action now sued on by the company could not have been made a set off—the two claims now in question could not have been balanced against each other; while, as it is, the railroad company suing first, and her claim arising in contract, a set off is allowed, and, that not being confined to matter arising in contract, the two claims now in question may be balanced—thus making the question whether mutual claims can be set off, depend, not on their character, but the accident of which party sues first.

We think set offs founded in torts can not be allowed under the code.

The set off in this case, at all events, so far as relates to the two cows charged to have been killed by negligence, is founded in tort, and is so answered in the suit, by the defendants.

Where the tort is waived, the tort-feasor is sued upon an implied promise to pay for benefit received, or the value of the property which he is enjoying or has enjoyed by means

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of his tortious act, and a suit will not thus lie only where benefit has been received. Chit. on Cont., 7th Am. ed., p. 607, notes. No such benefit was received in this case.

Another question. It is not entirely clear that a suit to foreclose a mortgage falls within the definition above given of an action upon a money demand on contract, in which set off is allowed. See, also, 2 G. & H. p. 96, sec. 70, clauses first and seventh, and sec. 72. But we think, where, in such foreclosure suit, the note secured by the mortgage is also sued on, and a personal judgment for overplus prayed, it may, at all events, be regarded as an action upon a money demand, within the statute, and a set off allowed. We need go no further on this point, in the case at bar.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

Oscar B. Hord and *Cortez Ewing*, for the appellants.

B. W. Wilson, for the appellee.

FARNSWORTH et al. v. COQUILLARD'S Adm'r.

PRACTICE—EXCEPTIONS.—Where exceptions are taken, during a trial, which must be gotten upon the record by bill of exceptions, such bill must be filed during the term, unless leave be given to file it afterwards, and then it must be filed within the time given, or, if afterwards, by the consent of the adverse party.

EXCEPTIONS AVAILABLE WITHOUT BILL OF EXCEPTIONS.—The reader is referred to the opinion at length, for a statement of some exceptions which will be available if properly noted on the record, without bill of exceptions.

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APPEAL from the *St. Joseph* Common Pleas.

PERKINS, J.—This was a proceeding to cause a credit upon a judgment to be expunged. Judgment of refusal to expunge. The plaintiff's appeal.

We must first ascertain what questions the record presents to this Court.

1. Where exceptions are taken during a trial, which must be got upon the record by bill of exceptions, and such bill is not filed during the term, in vacation of the Court, the bill must be filed within the time specified in the leave, or it will not become a part of the record, unless made so by the consent of the adverse party. *Spencer et al. v. Jelley*, and *Swinney v. Nave*, at this term.

Under this rule, the bills of exception filed in the case at bar, are not a part of the record. But,

2. Certain exceptions appear in the record without a bill of exceptions. The following are examples:

Exceptions properly noted in the record, to rulings upon demurrers to pleadings. *Matlock v. Todd*, 19 Ind. 130.

Exceptions thus noted to instructions. *Id.*

Exceptions to rulings on motions for new trial; *Id.* But, where the motion for a new trial is grounded on the evidence, the evidence must appear in a bill.

Exceptions to judgments on special findings of Court. See *Peoria Marine, &c., Ins. Co. v. Walser*, at this term.

Where exceptions are taken to matters occurring, during the progress of a cause, which must be, and are reserved by bills of exception, such exceptions, as well as some others, it must be remembered, in many instances, are waived, unless relied on in a motion in writing for a new trial on account of the rulings excepted to. See *Kent v. Lawson*, 12 Ind. 675.

Among the exceptions which must be reserved by bill, are those to rulings on motions touching changes of venue, empanneling and misbehaviour of juries, continuances, striking

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out, withdrawing, refiling, and amending pleadings, admitting or rejecting evidence, order and extent of argument of causes, &c., &c.

In the case at bar, there was a motion for a new trial, founded on five written reasons filed :

1. Irregularity in sustaining and rejecting motions touching the perfecting, reforming, &c., of the pleadings.

This we can not notice because there is no bill, duly filed, showing exceptions to the rulings complained of.

2. Giving a wrong judgment on the special finding of facts by the Court.

A motion for a new trial was not the proper instrumentality to correct such an error. There is no complaint but that the Court found the facts, as proved by the evidence; but the complaint is, that the Court misapplied the law upon the facts; as in erroneously ruling upon a demurrer, or a special verdict of a jury. The objection to the action of the Court, in this particular, should have been by moving, on the finding, a proper judgment, or excepting, at all events, to that rendered by the Court. But, while the record shows the special finding of the Court, duly filed and signed, it shows no exception to the judgment of the Court upon the finding, either noted upon the record, or in a bill of exceptions.

3. Same, in substance, as the second.

4. Judgment not sustained by the evidence.

This we can not judge of, because the evidence is not of record by bill of exception.

5. Judgment contrary to law

This may be true, and still this Court have no legal right to reverse that judgment; because a party may waive objections, and accept and acquiesce in such a judgment if he pleases, where the Court has jurisdiction of the cause, and a ground of action is stated in the complaint against a defendant, or of defence, in an answer to the complaint of a plaintiff.

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In this case, the record shows no objection taken at the proper time and in a proper manner to the rulings of the Court upon points of law; not by entry upon the record where objection might thus be shown, nor by bill, where objection must thus appear. It is to rulings of Courts, upon points of law, that exceptions must be taken. What is an exception? The statute defines it:

“An exception is an objection taken to a decision of the Court, upon matter of law.” 2 G. & H. p. 208. And the objection is taken by way of exception, and is shown to the appellate Court by being entered, in certain cases, upon the record, and in others, by bill of exception incorporated in the record.

No exceptions being shown to have been properly taken, in this case, to rulings of the Court, upon points of law, in the progress of the cause to judgment, nor to the judgment when rendered, this Court can not reverse that judgment.

Per Curiam.—The judgment is affirmed, with costs.

Liston & Farnsworth, for the appellants.

W. G. George and A. Anderson, for the appellees.

ROBERTS V. ROBESON.

NEW TRIALS.—In civil causes, only two new trials can be granted to the same party in the same cause, upon any grounds whatever.

APPEAL from the *Fayette* Common Pleas.

HANNA, J.—This case was here once before under the title of *Wynne* and another, against *Glidewell* and another. 17 Ind. 446. In accordance with the opinion then pronounced, a new

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trial was had in the *Franklin* Common Pleas, upon the said application of the plaintiffs. The defendants again had a verdict. On motion of the plaintiffs, the second verdict was set aside by the Court, and a new trial again granted. The plaintiff then obtained a change of venue to *Fayette*, where a third trial resulted in a third verdict for the defendants. On this a judgment was rendered over a motion for a new trial.

The first question that is presented is, whether, under the statute, a new trial could have been granted, even if sufficient cause had been shown therefor. The statute, upon the subject of new trials, specifically sets forth the causes for which such trials should be granted, under eight different heads, or subdivisions, and there the following language occurs in the same section: "But not more than two new trials shall be granted to the same party, in the same cause." 2 G. & H. 214. It is urged that this clause has reference to the particular reason, or cause, for which a new trial may be granted in pending litigation, as, for instance, two new trials might be granted under each of the heads, or subdivisions, enumerated in the statute. If the correct view of the statute is, that more than two new trials may be granted in the same case, or that two may be granted for each *cause*, which may legally be assigned therefor, then it follows, that the trials thus granted, might not be limited by even sixteen; for the first subdivision is, "Irregularity in the proceedings of the Court, jury, or prevailing party, or any order of Court, or abuse of discretion, by which the party was prevented from having a fair trial." Many things might occur that could be assigned under this clause, each of which would entitle the losing, or injured party, to a new trial.

It is evident, that it was the intention of those who framed and enacted this law, to put some limit to litigation. It is urged by the appellee, that the limit is that, if the Court so orders, the same party may have, upon showing good cause,

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three trials—three verdicts or findings—but no more; that is, that no more than two new trials shall be granted to the same party in the same suit, litigation, or case.

In other words, the contested question before the Court, is here meant by the word, cause. That is one of the meanings of the word cause, as well as that of case. 1 Bouv. L. Dict.

If this is the proper interpretation of this clause of the statute, it is not necessary to inquire as to whether the two new trials were granted for the same reason upon which the motion was the third time made; nor is it necessary to determine any other questions attempted to be raised in the record.

In view of the evident intent with which the statute was framed, and the peculiar phraseology used therein, to-wit: "in the same cause;" not *for* the same cause; we are of the opinion the Court had exercised the discretion conferred upon it, to the limit allowed by the statute, and, therefore, very properly refused a third new trial. In this conclusion we are strengthened by the different language adopted by the same body of law makers, in regard to applications for new trials in criminal trials; which may be made for five general reasons, the last being as follows: "5th. When the verdict is contrary to law or evidence; but not more than two new trials shall be granted for this cause alone." 2 G. & H. 424; showing that in criminal cases the limit does not attach as to the other causes which might be set forth.

Per Curiam.—The judgment is affirmed, with costs.

George Holland and *C. C. Binkley*, for the appellant.

Wilson Morrow and *James McIntosh*, for the appellee.

The Cincinnati and Chicago R. R. Co. v. McFarland.

THE CINCINNATI AND CHICAGO R. R. CO. v. MCFARLAND.

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STATUTES CONSTRUED—RAILROADS—ASSESSMENTS.—Section 697, 2 G. & H. 314, makes the complaint and return, as to the defendant, in an application for the assessment of damages against a railroad company, a cause of action, and authorizes him to raise issues of law upon them by the ordinary modes used in Courts of this State, which, being disposed of, may be followed by issues of fact, to be formed and tried according to the usual practice in civil cases.

PRACTICE.—It is not error to refuse a motion, or prayer of a party, to have a part of the issues in a cause tried at one time, by a jury, and the others, at another time, by the Court.

PRACTICE.—Where there is a difference between the journal entry of the clerk, and the recitals in the bill of exceptions, the latter must control.

APPEAL from the *Cass* Common Pleas.

PERKINS, J.—Complaint by *McFarland* against the *Cincinnati and Chicago Railroad Company*, for an assessment of damages. A jury was empaneled by the sheriff, and an assessment of damages was made and returned to the proper Court. Upon such return, the code provides, 2 G. & H. p. 314, sec. 697, that, "Any defendant may appear and traverse any material fact therein stated in the inquest, or he may plead or show any valid matter in bar of the right of the plaintiff to have the benefit of such writ, and issues of law and of fact may be made up and tried, and the Court may adjudge costs therein, and proceedings had as in other actions."

This section, it seems to us, practically makes the complaint and return, as to the defendant, a cause of action, and authorizes him to raise issues of law upon them, by the ordinary modes of motion, demurrer, &c., which, being disposed of, may be followed by issues of fact, to be formed and tried according to the usual practice in civil cases.

As to the plaintiff, where the return was against him, he might, of course, rest on his complaint.

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If, then, issues of fact are formed, in this class of cases, regularly, they would all be tried at the same time, and by the same person or persons. The Court might, at the request, or with the assent of parties, vary from this, but it would not be bound to. It would not be error in the Court to refuse a motion, or prayer of a party, to have a part of the issues in a cause tried at one time by a jury, and the others, at another time, by the Court.

In the case at bar, there were issues upon the complaint and return, and the record states in the journal entry of the clerk, that the cause was submitted, &c., the issues upon the complaint found for the plaintiff, and that the defendant then demanded a jury trial, upon the exceptions to the return, &c.

The bill of exceptions states the fact a little differently, and must control the clerk's entry, where the two conflict. It states that the defendant, on the call of the cause for trial, demanded "a jury trial upon his exceptions to the inquest," &c., which was refused, and the whole cause was tried by the Court on the voluntary submission by the parties of a part of the cause, &c.

Now, the only exception taken was to the refusal of the Court to allow a part of the cause to be given to a jury. But the Court had a right to refuse the motion to send a part of the cause to a jury. The Court rightly overruled that motion. What course the defendant should have taken, on the overruling of that motion, or what the Court should have done, we need not inquire. If the subsequent action of the Court was objectionable, it should have been excepted to.

The evidence is not in the record.

The judgment must be affirmed, with costs.

Per Curiam.—The judgment is affirmed, accordingly.

E. Walker, J. E. McDonald, and A. L. Roache, for the appellant.

Lauer v. The State.

LAUER v. THE STATE.

STATUTES CONSTRUED—CONSTITUTIONAL LAW.—TEMPERANCE LAW — Section 14, 1 G. & H. 617, is not embraced by the title of the temperance act, nor properly connected with the subject matter of it, and is therefore unconstitutional and void.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Indictment against *Lauer* for retailing; conviction and fine.

The prosecution was under the 14th section of the temperance law of 1859. 1 G. & H. 617.

That section is not embraced by the title of the act, nor properly connected with the subject matter of it; and is, therefore, void by the constitution.

That section is upon the jurisdiction of Courts, clearly a subject of legislation by itself, made so by the constitution.

The title of the act is, "an act to regulate and license the sale of spirituous, vinous, malt and other intoxicating liquors; to prohibit the adulteration of liquors; to repeal all former laws concerning the provisions of this act, and providing penalties for violation thereof." The subject of jurisdiction of Courts, and of practice therein for the prosecution of offences, is not mentioned in the title. See the cases on this subject referred to in *Kuhns v. Krammis*, 20 Ind. 490; *Thomasson v. The State*, 15 Ind. 449, is overruled on this point.

The judgment is reversed; cause remanded to be dismissed.

Jonathan W. Gordon and *McDonald & Roache*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

Hingle v. The State.

HINGLE v. THE STATE.

STATUTES CONSTRUED—TEMPERANCE LAW.—Under the temperance law of 1859, 1 G. & H. 617, there is no penalty against a person, licensed according to the act, for selling on *Sunday*.

SAME—OVERRULED CASES.—The cases of *Thomasson v. The State*, 15 Ind. 449; *Sohn v. The State*, 18 Ind. 389, and *The State v. Thomasson*, 19 Ind. 99, are overruled, so far as the decisions therein are inconsistent with the decisions in *Hingle v. The State* and *Lauer v. The State*, *infra*.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Indictment against *Hingle* for selling a gill of liquor on *Sunday*. The indictment does not aver that *Hingle* is a person "not being licensed according to the provisions of the act," &c., which, it must be remembered, is a penal one. There is no penalty in the act, upon a person being licensed according to the act, for selling on *Sunday*. A careful reading of the act will satisfy any one of this. The cases of *Thomasson v. The State*, 15 Ind. 449, and *Sohn v. The State*, 18 Ind. 389, and *The State v. Thomasson*, 19 Ind. 99, are overruled on this point. It was not much considered in those cases.

Did the act prescribe a penalty, it could not be enforced by indictment. *Lauer v. The State*, at this term. The indictment should have been quashed.

The judgment is reversed and cause remanded, that said indictment may be quashed.

J. W. Gordon, for the appellant.

Oscar B. Hord, Attorney General, for the appellee.

The Board of Trustees of the Wabash and Erie Canal v. Reinhart.

THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL v. REINHART.

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CONTRACT—LEASE OF WATER POWER.—Where successive leases of water power on the *Wabash and Erie Canal* are executed by the trustees thereof to different persons, and the water in the canal proves insufficient to supply the requisite amount to all the lessees, but is sufficient to supply some of them, the lessees should be supplied in the order in which the leases are executed.

EVIDENCE.—The best existing evidence of a fact must be produced to prove it; and therefore parol evidence of the contents of a record is not admissible; but, where the record or document is not a part of the fact to be proved, but is merely a collateral or subsequent memorial of the fact, parol evidence of such fact may be given.

APPEAL from the *Cass* Circuit Court.

PERKINS, J.—In 1846, the State of *Indiana*, by *Stearns Fisher*, her agent, made a lease of water power on the *Wabash and Erie Canal*, at *Delphi*, to one *Robertson*, to this extent, viz: "The use, &c., of so much of the surplus water, not required for the purposes of navigation, &c., as will be sufficient to propel a paper mill, not requiring more than four standard powers," &c.

The canal, water power, water rights, &c., subsequently passed to the Board of Trustees, &c., and the lease to *Robertson* passed by assignment to the plaintiffs.

The assignment was not approved by the chief engineer till some time after it was made, but the approval, when made, related back to the time of the assignment. *Ashley v. Eberts*, ante, 55. After the foregoing lease was executed, others were successively made to different parties.

When the supply of water began to decline, in the dry season, the mills on the canal had to stand idle more or less of the time for want of water; and the question in this case

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is, whether, when the water not needed for navigation, became insufficient to propel all the mills at *Delphi*, erected, under leases, upon it, the surplus of water was to be supplied to all the mills equally, or to be supplied, first to the mill of the first lessee, and then, if any yet remained, that to be supplied to the mill of the second lessee; in other words, whether, as the water failed, the mills were to stop in the inverse order of the leases, or *pro rata*, if we may use that term.

The Court below held that the mills were to stop in the inverse order of the leases. After considerable reflection, and some doubt, we have come to the conclusion that the Court was right. As matter of law, we think such was the operation of the successive leases; and we do not discover anything in the statutes controlling that operation, as governed by general legal principles. This being so, the simple facts that the Trustees made subsequent leases at the request of prior lessees, and that the rents would facilitate the collection of a debt by such prior lessees, could not change the legal effect of the leases, nor the rights of successive lessees.

The defendants below, the Trustees, set up a claim against the plaintiffs for the use of extra water, for power used in excess of the lease. As a fact tending to rebut the validity of the claim, the plaintiffs proved, by parol, that they had had transactions with the defendants, the Trustees, had passed receipts, and that the defendants, the Trustees, had not, before this suit, set up any claim for the use of extra water. The defendants then asked the witness, who stated the foregoing facts, if the transactions mentioned were not suits of which records existed, &c., and the witness answered that they were, whereupon the defendants moved that the entire statements of the witness be rejected as evidence, which motion the Court overruled.

It is a general rule that the best existing evidence of a fact must be produced to prove it; and where the matter to be

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proved is the contents of a record, or the terms of a written contract, and they are in existence, the record and contract are the best evidence. In this case, it was not the contents of a record or contract of which proof was given, but the fact that the defendants had never before, nor at certain times in particular, claimed pay for the use of extra water; and we think that fact might be proved by parol, even though, as to the particular times, there might be record evidence. Thus, says *Mr. Greenleaf*, "where, however, the record or document appointed by law, is not a part of the fact to be proved, but is merely a collateral or subsequent memorial of the fact, such as the registry of marriages and births, and the like, it has not this exclusive character, but any other legal proof is admitted." 1 *Greenl. Ev.* p. 125. See, also, sections 89, 90, 92 and 97 of the same volume; 3 *Ind.* 334.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages, and costs.

D. D. Pratt, for the appellant.

LAUER v. THE STATE.

APPEAL from the *Grant Circuit Court*.

Per Curiam.—The judgment in this case, is reversed and remanded to be dismissed, for the reasons given in *Lauer v. The State*, at this term; the questions involved being alike in both cases.

N. W. Gordon and *H. D. Thompson*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

 Blakemore v. Taber's Executor.

BLAKEMORE v. TABER'S Executor.

LEASE—CHATTEL MORTGAGE—ESTOPPEL.—*A* and *B* executed a lease to *C*, of certain land for seven years, at an agreed rent, upon which *C* agreed to erect certain buildings and to carry on certain business, which buildings *C* should own and be entitled to remove at the end of the term, and, to secure the payment of the rent, said buildings were declared in the lease to be mortgaged to *A* and *B*. The latter signed and acknowledged said lease, on *May* 29, 1857, and *C* did so on *July* 9, 1857, at which time said buildings had been erected on said premises, and on *July* 10, 1857, it was recorded in the mortgage record of the county. *D* was subscribing witness to the execution of the lease by *C*, and, by an arrangement subsequently made between him and *C*, he became the prospective owner of the improvements to be erected by *C* on the land.

Held, 1. That *D* was estopped by his own acts to deny the ownership of said lease and improvements by *C*, or his right to incumber them by liens, and all persons claiming under, or through *D*, were bound by that estoppel, as to liens created as above, unless they can show fraud or want of consideration.

2. That *A* and *B*, to the extent to which they had the first lien on said improvements, under the terms of said lease, could enforce it by foreclosure, against *D*, and those claiming under or through him, said lease, as to said lien, being equivalent to a mortgage.

3. That said lease in its character of mortgage, was not void for uncertainty, the property mortgaged being on the premises of the mortgagees, and to that extent in their possession and identified, and said mortgage being recorded.

That foreclosure is the proper remedy for the enforcement of a chattel mortgage.

APPEAL from the *Cass* Circuit Court.

PERKINS, J.—Suit for rent, and to enforce a lien for its payment. Judgment below for plaintiffs. The suit was commenced in 1859.

On the 3d of *April*, 1857, *Hamilton* and *Taber* made a con-

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tract in writing, leasing to one *Shoobridge*, a certain quantity of land adjoining *Taberville, Indiana*, for a term of seven years, upon the conditions that said *Shoobridge* erect on the land certain buildings, and carry on in them certain kinds of manufacturing, and that he should pay the taxes on said improvements, and should own them and have the right to remove them at the end of the term; and, further, should pay a certain annual rent for the land, to secure the payment of which, the said improvements, to be erected on the land by said *Shoobridge*, were declared, in said lease, to be thereby mortgaged.

Hamilton and *Taber* signed and acknowledged the lease on the 29th day of *May*, 1857. *Shoobridge* signed and acknowledged it on the 9th of *July*, 1857, and it was recorded on the next day, the 10th of *July*, 1857, in the mortgage record of the county. *Henry H. Euarts* was the subscribing witness to the execution of the lease by *Shoobridge*; and, at the time the latter executed, and *Euarts* witnessed it, both expected, as did, also, *Hamilton* and *Taber*, that *Shoobridge* was to be the owner of the improvements stipulated to be erected, and which were erected in the name of *Shoobridge*; he appears to have honestly been held out, at the time, as the prospective owner; but an arrangement was made afterwards between him and *Euarts*, by which his prospective ownership was extinguished, and, as between them, *Euarts* became the owner. This is clearly shown by the evidence.

Upon the foregoing facts, *Euarts*, having held out to *Hamilton* and *Taber* that *Shoobridge* was the proprietor of the lease, buildings, &c., is estopped, as against them, to deny such ownership, and the consequent power in *Shoobridge* to incumber them by liens; and all persons claiming under or through *Euarts*, are bound by that estoppel, as to liens created as above, unless they can show fraud, or want of consideration, on the part of *Hamilton* and *Taber*, in the transaction. No such showing is attempted.

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Hamilton and *Taber*, then, to the extent that they had the first lien, could enforce it, upon the property specified in the lease, against *Euarts* and those claiming through him, equally as efficiently as they could have done, had the lease been signed by *Euarts* himself.

It appears that on the 16th of *May*, 1857, *G. W. Blakemore* sold *Henry H. Euarts*, hereinbefore mentioned, a tract of land, three and a half miles south of *Logansport*, and took his notes for the purchase money. The notes were not paid, and judgment was obtained upon those first due, on the 30th of *October*, 1857. Execution was issued upon the judgment, and levied upon the property put upon *Hamilton* and *Taber's* land, under the lease above mentioned, as the property of said *Euarts*; and the question is, is the property subject to the lien asserted by *Hamilton* and *Taber* for rent? If it would be so subject, had the lease been made to, and signed by *Euarts*, instead of *Shoobridge*, it is so subject now, because *Hamilton* and *Taber* took the lien, such as it is, on the faith of a representation by *Euarts* to them, that the property belonged to *Shoobridge*.

Suppose, then, the improvements had been made by *Euarts*, under a parol agreement for such a lease as appears in this case, between him, instead of *Shoobridge*, on one part, and *Hamilton* and *Taber* on the other part; suppose, on the 9th of *July*, after the improvements had been so erected, such a lien as that actually appearing in this case, had been executed between *Euarts* and *Hamilton* and *Taber*, and had never been recorded, but that *Blakemore*, and all under him, had been actually notified of the existence of the lease, and its contents; could *Hamilton* and *Taber* have retained the lien on the property against an execution in favor of *Blakemore*, on a judgment rendered and execution issued after the full execution and such notice of the lease? This question is asked upon the hypothesis that the instrument called a lease, in the

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case, does not amount, also, to a mortgage. Story, 2d volume of Eq. Jur., sec. 1231, speaking of equitable liens, says:

"Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice; for it is a general principle in equity, that, as against the party himself, and any claiming under him voluntarily, or with notice, such an agreement raises a trust."

But we shall pass this point, because we think the lease contains a mortgage by *Shoobridge*, and by *Ewarts*, through *Shoobridge*, to *Hamilton* and *Taber* of the improvements, &c., named. It contains this clause: "And for the purpose of securing the prompt payment of the rent, and the punctual performance of the stipulations of this lease, [from *Hamilton* and *Taber* to him,] said *Shoobridge* [said *Ewarts* agreeing thereto,] hereby mortgages and warrants said buildings and machinery to the party of the first part, [said *Hamilton* and *Taber*.]"

This mortgage clause was signed on the 9th of *July*, 1857, as we have seen, by *Shoobridge*, being after the improvements were placed upon the leased premises, was duly acknowledged, and recorded on the next day, the 10th of *July*. As it was a mortgage by *Shoobridge* to *Hamilton* and *Taber*, the latter properly had it recorded in the book of mortgages. There was where third persons would look for such incumbrances. As to third persons, the case would stand thus. *Prima facie*, the improvements would belong to *Hamilton* and *Taber*, because of their ownership of the land on which they were situated. On inquiry, it would be found that they were owned by the lessee, but the lease itself, which disclosed the lessee's title, would, also, show the lien of the lessors, and, in

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addition, on examining the mortgage record, it would be again disclosed.

The mortgage, then, being valid, *Blakemore's* course was to sell, so far as *Ewarts* was concerned, the property covered by it, subject to the mortgage. This follows from the fact that the mortgage was the elder lien. *Lord v. Fisher*, 19 Ind. 7. See, also, 18 Ind. 250. Our statute treats chattel-mortgages, in this respect, like mortgages upon real estate. 2 G. & H. p. 240, sec. 436.

It is objected that the mortgage is void for uncertainty. But when we consider that the property mortgaged was all on the premises of the mortgagees, thus, to some extent, in their possession, and that the mortgage covered all the buildings and machinery, which, being, as we have said, on the land of the mortgagees, were thus separated from all other property, and identified; and the further fact that *Blakemore*, and all others concerned, had notice, &c., we think the mortgage can not be held void, or inoperative as to any of the described property for uncertainty.

It is also insisted, that a suit by foreclosure will not lie upon a chattel mortgage. As our statute places chattel mortgages on the footing of mortgages upon real estate, in this, that it recognizes the legal title, the equity of redemption, as remaining in the mortgagor, and the mortgagee as having but a lien, it follows that a foreclosure is the proper mode of procedure to enforce the lien, and extinguish the equity of redemption. 3 Wend. 500; 11 Ind. 398; 18 Ind. 141; Will. on Per. Prop. side p. 45; Same on R. Prop., do. 357. See, as bearing on this case, *Chandler v. Caldwell*, 17 Ind. 256. Also, see 14 Ind. 231; 5 *id.* 293; 2 *id.* 663; 7 Blackf. 284; 8 *id.* 420, 1 Ind. 356; 11 Ind. 319; 2 Story's Rep. 630; Smith's Mer. L. 693. These last citations are upon the power to mortgage property, not in existence at the time. See, also, 8 Ind. 364.

In the case at bar, it will be observed, the seven years for

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which the mortgage was to run, had not expired at the commencement or trial of the suit; and surely *Blakemore* could not complain that the remedy by foreclosure was adopted. And, under our statutes, and upon general principles of equity, we see no reason why the general rules of foreclosure, as to mortgages, should not be applied in cases of chattel mortgages. See 2 Hill, on Mort., pp. 346, 478, 504, as to chattel mortgages.

But it further follows, from the above propositions, that in selling the mortgaged property, on *Hamilton* and *Taber's* judgment of foreclosure, on failure of *Blakemore*, or others interested, to pay the money found due on it, the Court, or sheriff, might cause such part of that property as had not been sold, or incumbered by later mortgages, to third persons, to be first disposed of. *Aiken v. Bruen*, 21 Ind. 137.

Per Curiam.—The judgment below is affirmed, with costs.

L. Chamberlain and *George W. Blakemore*, for the appellant.

D. D. Pratt, for the appellees.

23	471
185	161

LAFFERTY v. JELLEY.

CHAMPERTY—CONTRACTS.—Where *A*, by power of attorney, constitutes *B*, a lawyer, his agent to secure and collect his interest in an estate, and, as a part of the same transaction, *B* agrees to prosecute the claim for *A* for one-half of whatever of said estate he might so obtain, it being apparent that litigation in Court was contemplated for the recovery of said claim, such contract is champertous and void.

PRINCIPAL AND AGENT.—As a general rule, in all cases where a person is, either actually or constructively, an agent for another, all

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profits and advantages made by him in the business of the agency, beyond his ordinary compensation, will belong to his principal.

ILLEGAL CONTRACT—RESCISSION.—A party to an illegal executory contract may rescind or repudiate it, and an executed contract subsequently made, inconsistent with it, will amount to a rescission or repudiation of it.

APPEAL from the *Ohio* Common Pleas.

PERKINS, J.—In 1850, *John M. Daniels* departed this life, intestate, at *Rising Sun, Indiana*, leaving neither widow nor children, but an estate of the value of some 3,000 dollars. Letters of administration upon his estate were granted to *Brown, Tapley and Dodd*. See *Brown v. King*, 2 Ind. 520.

In *February*, 1851, the Court ordered the administrators to pay over the moneys belonging to the estate to *James S. Jelley, Esq.*, as agent of *John, James, Nancy, Darius and Boone McGee*, alleged infant heirs of said *John M. Daniels*, deceased. This illegal order was reversed by the Supreme Court. See *Tapley v. McGee*, 6 Ind. 56.

In 1858, the administrators of *Daniels* obtained judgment against *Jelley*, in a suit that had been pending for some length of time, for 2,681 dollars and 26 cents, of which judgment, it would seem, *Jelley* paid at least 600 dollars. The balance of the judgment, we take it, represented the amount of money in *Jelley's* hands, belonging to the estate of *Daniels*, for distribution among his heirs; and the question had arisen, who were those heirs? The *McGees*, above named, were the kindred of *Daniels* first discovered. They were cousins, living in *Pennsylvania*. Next, *Mary Lafferty*, wife of *James Lafferty*, a sister of *Daniels*, living in *Canada*, was found. She was the heir.

On the 30th of *August*, 1854, said *Mary Lafferty*, jointly with her husband, executed to *John W. Spencer*, of *Rising Sun, Indiana*, a power of attorney, to, in their names, prose-

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cute and defend all suits then pending, or thereafter to be instituted, touching the settlement and recovery for them of the estate of *John M. Daniels*, deceased; and, on the same day, apparently as a part of the same transaction, entered into an arrangement with *Spencer* by which he undertook "to prosecute the claim of *Lafferty* and wife to the estate," &c., for "one-half of whatever of said estate" he might so obtain, &c.

Under this contract, we may here remark, *Mrs. Spencer*, then the wife, and now the heir of *John W. Spencer*, who has deceased, claims the proceeds of the judgment against *Jelley* above referred to; but, according to the case of *Coquillard's Adm'r v. Bearss et al.*, 21 Ind. 479, and the cases cited, we think the contract champertous and void. We think litigation in Court was contemplated for the recovery of the subject matter of the contract. The questions as to how far the contract had been executed, whether it had been by the *Laffertys* repudiated, and whether *Spencer* was not entitled upon a *quantum meruit* for services rendered, are here passed by. See, however, *Tracy v. Talmadge*, 4 Seld. (N. Y.) Rep. 162.

Early in 1851, at least, *Jelley* had become the attorney of the *McGees*, and undertaken to obtain the estate of *Daniels* for them. As early as 1855, at least, he had notice of the existence of *Mrs. Lafferty*, her relationship to *Daniels*, and of her contract with *Spencer*. On the 17th of July, 1858, while the suit by the administrator of *Daniels* against *Jelley*, for the moneys of the estate in his hands, was pending, and had been continued from term to term for a year, and in which suit the recovery was for 2,600 dollars, a paper of the following substance was executed to him:

"Know all men that, we, *James* and *Mary Lafferty*, of *Montreal, Canada*, for 250 dollars in hand, paid by *James S. Jelley*, and for certain further considerations, &c., have this day sold and assigned to said *Jelley*, all our interest in the personal

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estate of *John M. Daniels*, deceased, to control and manage so far as our interest hereby sold is concerned, and give him power to settle said estate, as may be satisfactory to him, to give receipts, and as our attorney, to strike out our names from all suits, and to insert his own instead if he desires. And we disclaim having any rights in said estate from this day; and it is understood and agreed by us that, in consideration of this settlement and compromise, we release all claims to all moneys heretofore paid by administrators of said estate, by order of the Probate Court of *Ohio* county, to said *Jelley*, as attorney of the heirs of *Dudley McGee*, and for — *Owens*, their guardian; the same is released to said *Jelley*, and we direct that any suit or suits for the recovery of said moneys may be dismissed.”

It thus appears that, while *Jelley* was defending a suit in behalf of the *McGees*, his clients, he purchased in the subject matter of the suit, from those claiming by another title, for his own benefit. This, it would seem, he could not do, should those parties interpose. *Story* says, in his work on Agency, sec. 211, that it is a general principle, “that in all cases, where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are for the benefit of his employers.” It may be observed that *James Lafferty* swears that *Jelley* was to give his wife half the estate over and above the 250 dollars. *Jelley* did not plead this assignment of the estate, in the suit pending, but, after judgment against him in that, he instituted this suit to obtain an entry of satisfaction upon the judgment, on the ground that he was the beneficial owner of it, in his own right, and he obtained judgment for such entry of satisfaction below, from which the present appeal to this Court was taken.

Jelley's right to the entry of satisfaction of the judgment was resisted below, by, among others, *John Lafferty*, a son of

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James and Mary Lafferty, to whom said *James and Mary*, on the 26th of *November*, 1858, relinquished, for a consideration, all their interest in the estate of *Daniels*, deceased.

A party to an illegal executory contract may rescind or repudiate it. *Morris v. Philpot*, 11 Ind. p. 447.

Hence, the contract of the *Laffertys* with *Spencer* did not preclude them from selling their interest in *Daniels'* estate to *John Lafferty*. And, it having been judicially established that *Mary Lafferty* was the legal heir to all *Daniels'* estate, and that estate being in *Jelley's* hands, if he, by representations, fraudulent in law, obtained an acquittance from the heir by paying a less sum than the heir was entitled to, the heir, or assignee of the heir, may show such fact, and recover the balance due. See *Crassen et al. v. Swoveland*, at this term.

A receipt for an entire debt, upon payment of a part of it, even where there is no fraud, will not always protect the debtor from a suit for the balance. *Fitzgerald v. Smith*, 1 Ind. 810.

Does the record make a case of fraud, in the eye of the law, on the part of *Jelley*, in settling with *James and Mary Lafferty*? In answering this question, we shall treat the contract then made by *Jelley*, as made on his own account, and not on account of his clients, the *McGee* heirs, because he has so treated it, and they are not now interposing.

We are constrained to hold that the record, all that we can look at, makes a case of fraud. The record informs us that:

1. *Jelley* represented to *James Lafferty*, who acted for his wife in the premises, that the question of the heirship of his wife was doubtful, while *Jelley* himself considered it so clear that he had abandoned the conflicting, or rival claim, of the *McGees*, and was proceeding to buy from *Lafferty* on his own account.

2. He represented that he had paid amounts to the *McGees* under an order of Court, which would protect him from re-

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payment, when he had not paid them any thing, but had the whole estate in his own hands. This was matter touching which *Lafferty* almost necessarily relied on the statement of *Jelley*.

8. He represented that the balance of the estate did not amount to more than 500 dollars, when he must have known that it amounted to over 2,000 dollars. This was matter peculiarly, under the circumstances, within his knowledge.

Considering the situation of the respective parties, we think these facts make a case of fraud in law, and they are not, in our opinion, rebutted by any thing appearing in the record. The parties did not stand on equal ground. The case is a peculiar one in its facts and circumstances. We think the motion for a new trial should have been sustained below, because the finding was against the evidence. We are not satisfied that right has been done in this case, and think there ought to be another trial.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for a new trial.

A. C. Downey, for the appellants.

J. E. McDonald and *A. L. Roache*, for the appellee.

MANSUR v. BRADLEY.

PRACTICE—MODE OF EXAMINING WITNESS.—Where a witness is allowed by the Court to read his testimony in chief to the jury, from a previously written narrative, without interrogations, over the objection of the adverse party, and the witness is then subjected to a full cross examination by the adverse party, and re-examination by the party producing him, in the usual manner, this Court will not

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reverse the judgment below on account thereof, unless it appear that the complaining party was injured thereby, but, the evidence not being in the record, will presume in favor of the lower tribunal. **PRACTICE IN SUPREME COURT.**—As to points of practice in this Court, see the latter part of this opinion.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—*Mansur & Co.*, sued *Bradley* for about 5,000 dollars. The complaint was filed against *Bradley & Woolley*, but, *Woolley* not being found, was prosecuted against *Bradley*.

The complaint was composed of three paragraphs:

1. Against *Bradley & Woolley*, as late partners, doing business as bankers, for 5,000 dollars, money lent.

2. Against the same as partners in the business of bankers and brokers, under the name of the Bank of the Capitol, and avers that on the 14th of *September*, 1857, said defendants procured the plaintiffs to deposit, upon a loan with them, the further sum of 4,872 dollars and 85 cents, and deliver to the plaintiffs their certificate, called a certificate of deposit, and set out the certificate *in haec verba*: "*Mansur, Ferguson & Co.* have deposited in this bank, 4,872 dollars and 85 cents, &c., signed by defendants by the name of *John Woolley*, cashier, by means whereof," &c.

3. Plaintiffs, at the request of defendants, deposited with them, as bankers and brokers, on &c., 4,872 dollars and 85 cents, to be safely kept by them and returned upon request. Yet defendants have failed to pay on request, &c., and have converted the same to their own use, and unlawfully assigned it to others, &c., wherefore, &c.

Bradley answered:

1. General denial.

2. That plaintiffs deposited with *Woolley*, in the Bank of the Capitol, (one of the free banks under the act of 1852,) and afterwards, on the 15th of *September*, 1857, took from said bank said certificate, &c., said *Woolley* being the cashier,

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&c., and said plaintiffs so understood it to be the certificate of the bank, and that no part of the money ever came to the hands of *Bradley*; and that he had no interest in, or connection with said establishment, except as an employee, and as president of said incorporated bank, for a short time, at a salary; and that all his connection with said bank had terminated before said deposit.

3. That *Andrew Wilson* and *Woolley* organized the Bank of the Capital in 1854, under the general law of 1852, which proceeded to do a general banking business until *September 16, 1857*; that said plaintiffs, during all that time, transacted with said incorporated bank a large amount of business; as purchasing drafts, depositing money, &c., and checking it out from time to time; that said defendant was president of the bank for a short time, on a salary, and had no other connection with *Woolley*; that he had no share in losses or profits; and all his connection ceased before plaintiffs' deposit was made; that said deposit was made with said *Woolley*, in said free bank, and not with the defendant and *Woolley*, as alleged, and that no part of it ever came to the hands of *Bradley*.

4. Other paragraphs.

The other paragraphs are substantially the same—all deny any partnership with *Woolley*, and aver that all that *Bradley* ever did was as a mere employee on a stipulated salary, discharging, as his duties, what would have been the duties of a president, without any interest whatever in the profits and without any liability for the losses, and denying that any of the plaintiffs' money was ever left with, or came to the hands of the defendant, *Bradley*, but was left with *Woolley*.

To the several answers, the plaintiffs reply—1st. By a general denial; and, 2d. That the incorporated Bank of the Capital did not, before the 1st of *March, 1857*, comply with the provisions of the act of 1855, and so said bank ceased to have any existence.

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The cause was tried by a jury, who found for the defendant. The plaintiffs moved for a new trial on the grounds:

1. The Court erred in permitting *Bradley* to read his testimony from the paper prepared by him in recitative form, without interrogatories.

2. The Court erred in giving certain designated charges.

3. The Court erred in refusing certain designated charges, which it was asked to give.

The motion for a new trial was overruled, and there was final judgment for the defendant.

As to the alleged error of the Court, assigned as the first ground for a new trial, the record states the facts, thus:

"Upon the trial of the cause, *John H. Bradley*, the defendant, was called as a witness, on his own behalf, and produced a paper, stating that he had, at the request of counsel in the case, and to save time, committed his testimony to writing, upon the paper produced, and could read the same to the jury, if so permitted, to which the plaintiff, at the time, objected and excepted, but the Court overruled the objection, and permitted said *Bradley* to read, at length, his testimony, in the form of a narrative, without interrogations being put until after the entire paper was read; a full cross examination and further re-examination of the witness was permitted after he had read the paper."

There are two reasons, at least, why we can not reverse the judgment in the case for this action of the Court below:

1. It is not shown that the plaintiffs, the complaining party, were injured by it.

2. We have a right to infer, in favor of the action of the Court below, that the plaintiffs' counsel, as well as the defendant's, knowing that *Bradley* was to be a witness, had agreed that he should write out his testimony, and thus estopped themselves to object simply on the ground that it was so written, no improper or irrelevant matter being contained

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in the writing. Neither the written, nor oral testimony, given by *Bradley*, is in the record. We know nothing of its character, and a mere irregularity in the manner of presenting the testimony of a witness, even if not waived below, would not be ground for reversal of a cause where it could have worked no injury. In this case, no objection was made below to any part of the evidence of *Bradley*, nor is there any made here; the Court below was satisfied no injury had been done, and no data are furnished us whereby we can say that any did happen. In such cases, all presumptions are in favor of the action of the tribunal that tried the cause.

We now proceed to the alleged errors in giving and refusing instructions.

The plaintiffs sought to maintain their action on two theories:

1. That *Bradley* was a partner of *Woolley*.
2. That both of these men held themselves out as officers and agents of an existing bank, when the bank was extinct, whereby, it is claimed, they became liable as principals.

We will permit counsel to here state their points for themselves. We quote from their brief:

"The appellants excepted to instructions given by the Court to the jury, upon its own motion, No.'s 1, 2, 7, 8. The Court refused to give instructions No.'s 1, 3, 4, 5 and 6, as asked for by the appellants, and gave No. 3 in a modified form, to which the appellants also excepted. And the Court gave, in a modified form, an instruction asked for by the appellee, to which the appellants also objected and excepted. These instructions are based upon *Bradley's* supposed liability as a partner in one case, and upon his supposed liability as a pretended agent of a pretended bank, he acting without a principal. As to the question of a partnership, we do not claim that we have any grounds to complain, but as to the liability

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of a pretended agent, acting without a responsible principal, we have no doubt the Court mistook the law.

Perhaps this appears most plainly in the modified charge, found upon page 50 of the record, in that, the Court says that "if the money was actually left with *Woolley*, there is no question that he is liable, and if *Bradley* was not then in partnership with *Woolley*, he is not liable, &c.,—the latter part of this instruction does not change this part of it. Here the Court charges the jury directly that *Bradley* is not liable at all, unless he was a partner with *Woolley*. This, of course, precludes any recovery upon the liability of *Bradley* as a pretended agent, acting without authority and without any responsible principal. It virtually shuts out that part of the case. There is no attempt, in this charge, to confine it to a case of partnership only, but it goes to the whole action."

As counsel admit that there was no error in the giving or refusing instructions as applicable to the evidence, so far as it related to the hypothesis of partnership, we shall confine what we have to say, to the other hypothesis, namely, that the defendants were pretended agents of an extinct bank. See, as to liability of pretended agents, *Dun. Pal. Ag.* 374; *Story on Ag.*, secs. 264, 265; 2 *Kent* 629; 7 *Cush. Rep.* 188; *McHenry v. Duffield*, 7 *Blackf.* 41.

In *Wilson v. Tesson*, 12 *Ind.* 285, it was decided that the Bank of the Capitol, as one of the free banks of the State, could not, after the coming into force of the act of 1855, do a general banking business, it not having complied with that law; but by that law, it had two years in which to wind up, during which its officers might remain discharging the business incident to such winding up; and as the evidence is not in the record, we can not say that there was any evidence tending to show that any representation was ever made or countenanced by *Bradley*, that the bank was in existence for any other purpose, or was assuming to act for any other pur-

Catterlin v. Somerville.

pose, than that of winding up; or that *Bradley* remained in the bank beyond said two years. Hence, we can not say that any instructions, touching such representations, would have been relevant, and, consequently, can not say they should have been given. And as the bank was in existence, and officered during two years, from 1855, for winding up simply, under a general law of which every body was bound to take notice, if *Woolley*, the cashier, of his own volition and on his own authority, simply made contracts outside of the power of the bank, he alone is responsible on those contracts, nothing being shown to indicate participation in them by others. See *Wilson v. Tesson*, *supra*.

We can not say, therefore, that the Court ought to have instructed the jury upon the hypothesis that *Bradley* was holding himself out as an agent of a bank having general banking powers.

Per Curiam.—The judgment below is affirmed, with costs.

Barbour & Howland, for the appellants.

John L. Ketchum, for the appellees.

CATTERLIN v. SOMERVILLE.

ACTION.—Where money is paid but not credited on a judgment, and afterwards execution is issued thereon, and the whole amount collected by levy and sale of the property of the defendant, the latter may maintain an action against the plaintiff for the money so paid and not credited.

DEMAND.—Where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without demand, no demand is necessary before suit against him for such money.

Catterlin v. Somerville.

APPEAL from the *Clinton* Common Pleas.

PERKINS, J.—*Fowler* and *Earl* had a judgment against *Somerville* and others. Before its full satisfaction, the defendants paid to *Sims*, attorney, for *Fowler* and *Earl*, 100 dollars on the judgment, taking a receipt which specified that the amount was paid to be credited on the judgment. *Sims* paid the 100 dollars to *Catterlin*, the agent of *Fowler* and *Earl*. It was not credited on the judgment. Afterwards an execution was taken out by *Fowler* and *Earl*, upon their judgment, and the whole amount collected from *Somerville* and others, the defendants in the judgment.

This suit is by *Somerville* and others against *Catterlin* to recover back the money paid him by *Sims*, which was paid to the latter by *Somerville*, &c.

The action for money had and received will lie in such a case; and that being so the judgment in the case at bar was right. *Weisner v. Buckley*, 15 Wend. 821; *Smith v. Weeks*, 26 Barb. (N. Y.) Rep. 492, where the cases on this subject generally are collected, and criticised; also, Chit. on Cont., 7th Am. ed., p. 639, note.

No demand was necessary before suit in this case. An agent or trustee is, in general, not liable to his principal, or *cestui que trust*, without a demand; but *Catterlin* is not here sued by his principal; and, in cases where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without a demand, no demand is necessary before suit. This was such a case. See, for authorities, *Walworth v. Thompson*, 6 Hill (N. Y.) Rep. 540; *Stacy v. Graham*, 14 (N. Y.) Rep. 492.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. N. Sims, and *McDonald & Roache*, for the appellant.

R. P. Davidson, for the appellee.

The Central Plank Road Co. v. Hannaman.

THE CENTRAL PLANK ROAD CO. v. HANNAMAN.

STATUTES CONSTRUED—FORFEITURE OF ROAD CHARTER—CONSTITUTIONAL LAW.—The title of the act of *March 5, 1859*, 1 G. & H. 491, is sufficient to embrace a section authorizing the forfeiture of a charter as to a part of a road.

SAME.—Said act authorizes the forfeiture of less than the whole of the portion of any road which may be within any one county.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—On the 4th day of *June, 1858*, *Hannaman* and others filed a complaint against the *Central Plank Road Company*, alleging that the company had permitted that part of the road in *Marion* county, between *Indianapolis* and the line of *Hancock* county, to remain for six months out of repair, &c.

The complaint was demurred to, the demurrer sustained, and leave given to “amend the complaint.”

An amended complaint was filed consisting of a single paragraph.

The defendant then demurred, says the Clerk, to the second paragraph of the complaint.

Afterwards, no action being had on the demurrer, the defendant answered “the complaint.”

Afterwards, the plaintiffs “amend their complaint herein,” by leave of Court, and say that what they file is “by way of amendment to the complaint herein before filed,” but the Clerk miscalls the amendment to the complaint, “the amended complaint.”

What we have said shows that the record does not commence at the filing of this amendment.

The defendant demurred; the Court overruled the demurrer; an answer was filed; a trial was had, and there was judg-

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ment for the plaintiff, and for the vacation of a specified portion of the road.

The evidence is not of record, nor are the instructions, which were given or refused. No questions are raised by the record, except upon the act of the legislature under which the proceedings were had. Two questions are made upon that:

1. That under the title of the act, no section would be valid authorizing the forfeiting of a charter as to a part of a road embraced by it.

2. That the act itself does not authorize the forfeiture as to less than the whole of the portion of any road which may lie within any one county.

We think the first question must be ruled against the appellant. The title of the act is as follows:

"An act to prohibit the collection of tolls upon gravel, turnpike, McAdamized, and plank roads in certain cases; and to provide the mode of declaring charters of such roads forfeited in certain cases, and repealing all laws inconsistent herewith."

The whole includes the parts; and properly connected with the subject of prohibiting the collection of tolls, and declaring charters forfeited, certainly is the right of defining extent, and limitation to parts. See *Lauer v. The State*, and cases cited, at this term.

The second question must also be decided against the appellant.

The tenth section of the general plank road law enacts that, "if any such road, after its completion, or any part thereof, shall be suffered to be out of repair," &c. 1 G. & H. 477.

The whole section reads thus:

"SEC. 10. If any such road, after its completion, or any part thereof, shall be suffered to be out of repair so as to be impassable for the space of one year, unless when the same is repairing, said company shall be liable to be proceeded against

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by *quo warranto*; and if such company shall suffer the road to be out of repair to the hindrance or delay of travelers for any unreasonable length of time, they shall have no right to collect tolls thereon until the same is repaired."

This section contemplates the depriving of the corporation of its charter for the act of suffering a part of the road in a county to be out of repair for a year, and subjects it to a forfeiture of the right to collect toll for the act of suffering the road to be out of repair for a shorter period.

The first section of the act under which this suit was prosecuted is, "that hereafter when any," &c., the corporation shall not be allowed to "collect toll upon such road, or upon so much of the same as is out of repair," &c., if suffered to remain out of repair for a longer time than is reasonably necessary to put it in repair. 1 G. & H. 91.

The second section reads as follows:

"In all cases where any road specified in the above section, shall be suffered to get and remain out of repair, so as to be inconvenient for the public travel, for the space of six months or more, at any one time, and if the same is not being repaired, it shall be lawful for any voter of the county, through which the road, or any part thereof, may run, to file a complaint with the clerk of the Court, verified by his oath, or affirmation, setting forth that the road, (describing it,) or so much of the same as lies within the county in which he resides, is out of repair, and has so been for the last six months, and that the same is not being repaired, and that he has no good reason to believe that such repairs will be speedily made."

The third and fourth sections pertain to giving notice, &c. The fifth section of the act is thus:

"The Court before whom any case under this act may be heard, shall, after hearing all the proof and allegations, and being fully advised as to the material facts of the case, declare,

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if in the opinion of the Court or jury trying the same, the road has been suffered to get and remain out of repair so as to come within the provisions of the second section of this act, that all the rights and immunities that the defendant or defendants may have, by virtue of any charter granted or under any act of incorporation of this State, forfeited; *Provided, however*, such forfeiture shall only apply to so much of said road lying in said county as has been proven to be out of repair, as set forth in the second section of this act. *And be it further provided*, that in all cases where the Court or jury shall declare a forfeiture under the provisions of this act, such forfeiture shall in no wise affect any right, contract, suit or liability which existed prior to such forfeiture; but the same shall have the same force and effect as though such forfeiture had never been decreed."

The sixth section reads thus:

"Whenever any forfeiture of chartered or incorporated rights shall be declared, under the provisions of this act, it shall be held to be a vacation of so much of said road as may be declared forfeited; *Provided*, the grounds upon which such road was located was not a public highway prior to the location of such road; in which case, the same shall be deemed a public highway, and be worked as all other highways."

Under these sections we think the distinction intended relates to time during which the road or a part of it is suffered to remain out of repair, not to the length of line of road which may be out of repair.

This is the most favorable construction for the company; because, otherwise, when a portion of a road in a county had been suffered to remain out of repair for six months, the Court, being compelled to treat the entire portion in the county as a unit, would have to hold it all out of repair, and vacate the whole of the road in the county. How much

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length of the road, for a given extent out of repair, under the present ruling, should be forfeited, we have not now to decide.

Per Curiam.—The judgment below is affirmed, with costs.

Barbour & Howland, for the appellant.

HARLAN v. STOUT.

PARTIES.—A tenant in common, not a party to proceedings in partition on the part of his co-tenants, is not effected thereby in any manner.

PARTITION—PURCHASER OF COMMISSIONER.—The fact that one of the parties in interest was not a party to proceedings in partition in which the land was ordered to be sold by a commissioner, would be sufficient of itself, on the application of the *bona fide* purchaser at such commissioner's sale, to set the same aside.

PARTITION—NON-CONFIRMATION OF SALE.—As to facts which would make it the duty of the Court, on the application of the owners, or part of them, to set aside a sale of land made by a commissioner in partition, see the opinion at length.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—*Henry Miller*, one of the heirs of *Jacob Miller*, deceased, filed his complaint for partition in the *Marion* Circuit Court. The property of which partition was sought, was a lot in *Indianapolis*. The defendants made default. Commissioners, appointed to make a partition, reported the property not divisible, &c.; an appraisement of it was made and reported; a sale, at private sale, was ordered; a commissioner to make it appointed; a sale was made and reported, but, at the term of the Court when the report came up for confirma-

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tion, a portion of the heirs appeared and resisted the confirmation and moved to set aside the sale made. The Court overruled all objections and confirmed the sale. An appeal was taken to this Court.

The only question is, should the sale have been set aside?

The written motion to set aside the sale rested on three grounds:

1. The omission of the name of one of the heirs in the complaint and notice for partition.
2. Mistake or fraud in the sale made.
3. A sale made at much less than the property sold would bring.

Had the purchaser applied to set aside the sale on the first ground, it would have been sufficient of itself. Not so, when the application is made on the part of the heirs who were made parties, and no special injury is shown to have resulted to them from the omission to make others parties. Still, public policy requires, not only that the interest of the parties should be well cared for, but that titles, also, should be made good and litigation avoided in judicial sales, and the question of parties might have its weight with other facts. The omitted heir is not bound by the proceedings, and may have relief. See Bick. Pr. 542.

On the second and third points, we think the sale should have been set aside.

The property in question was situate in *Indianapolis*, and the sale was advertised only by notices posted up at certain places, a mode not as likely, we think, in a business city, to bring the notice to the attention of those likely to purchase property, as by advertisement in the daily papers.

The property was sold for 2,500 dollars, on payments, at at which sum it had been appraised.

On the trial of the motion to set aside the sale, the following witnesses testified, touching the price of the lot, thus:

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Mr. Burton, said the lot was worth 2,700 dollars. He did not say it was not worth more.

Mr. Douglass, said it was worth 2,300 dollars. He did not say it was not worth more.

Robert George, said it was worth 3,000 dollars. Did not hear it was for sale till after the sale.

D. B. Hosbrook, would give 3,000 dollars for the property, cash down. Did not know it was for sale till after the sale.

Susannah Harlan, would give 3,000 dollars for the property; was able to buy it.

Alexandrine McCarty, had agreed to give 3,000 for the lot, if title could be made in time.

Mr. Vincent, was willing now to give 3,000 dollars for it.

Mr. Stout, the purchaser, says the property was worth but 2,500 dollars.

The testimony, as to the circumstances under which the sale took place, is as follows:

Mr. Fishback, the commissioner for sale, states:

"*Mrs. Fetty*, one of the heirs, called before any negotiations of sale had taken place, and said she wanted 3,000 dollars for the lot. I requested her to find a buyer. One day I found *Mr. Stout* in my office. He wanted to buy the property. I told him to see *Mrs. Fetty*, and report, and that report would govern in the sale.. He reported that *Mrs. Fetty* consented to a sale at 2,500 dollars. That report controlled my action in selling to *Stout* at 2,500 dollars; but, for it, I should not have sold. Soon after the sale, the parties interested came to my office, and objected to the sale. If I had not been influenced by *Stout's* report from *Mrs. Fetty*, I would not have sold. Had not sold property to *Stout*, when the latter went to see *Mrs. Fetty*."

Mrs. Fetty states that she never consented to a sale, for less than 3,000 dollars; that she told *Mr. Stout*, all the time, that

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that was the lowest sum. She consented in no manner, to anything less.

Mrs. Mathews says she heard the conversation at the interview between *Mrs. Fetty* and *Mr. Stout*, and that *Mrs. Fetty* told *Mr. Stout* all the time, and when he left, that she consented to no sale for less than 3,000 dollars.

Mr. Stout says he saw *Mrs. Fetty*; told her he had bought the property of *Fishback*, the commissioner, for 2,500 dollars; she objected, but said *Fishback* was commissioner and could do as he pleased. I told *Fishback* that *Mrs. Fetty* did not want to take 2,500 dollars, but as her brother wanted money, he, *Fishback*, might do as he pleased.

On all the facts of the case, the Court should have set aside the sale, had proper parties made in the petition and notice, &c., at the proper time, ordered a re-sale, &c.

Thomas A. Hendricks and *Oscar B. Hord*, for the appellants.
L. Barbour and *J. D. Howland*, for the appellee.

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MUNICIPAL CORPORATIONS—POWER TO MAKE SEWERS, &c.—Under sections 59, 66, 68 and 69, of the general act for the incorporation of cities, it is competent for the common council of any city organized under that act to construct sewers, and assess the expense thereof upon the owners of the adjoining lots, in the same manner in which the expense of ordinary street improvements may be assessed.

22	491
131	111
132	29
23	491
142	188
23	491
153	616

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SAME—STATUTES CONSTRUED.—The words, in section 66, “or for either kind of improvement, or for a full improvement in general,” have reference to and embrace all the improvements authorized by the 59th section of said act.

SAME—APPEAL UNDER § 69.—Where an appeal is taken under this section, it is not competent for the appellate Court to inquire whether the petitioners for the improvement were residents of the city; or whether the petition had been signed by the requisite number of persons owning property on the street; or whether two-thirds of the councilmen concurred in making the improvement without petition; or whether the contractor was the lowest and best bidder; or into any other *fact* which arose before the making of the contract.

SAME—CONSTITUTIONAL LAW.—That part of section 69, limiting the inquiry on appeal to facts which arose after the making of the contract, is constitutional and valid.

STATUTORY CONSTRUCTION.—Acts involving questions of constitutional law should be strictly construed, unless, on applying the usual rules of construction, doubt should still exist whether the enactment is constitutional, and, in such case, the doubt should be solved in favor of the action of the Legislature.

SAME—STATUTES CONSTRUED.—That part of section 69 prescribing the form of judgment to be rendered on appeal may be unconstitutional, and may be regarded as stricken out without materially changing the law, because, under the general provisions of the same law, the contractor would be entitled to the same relief substantially.

CONTRACT—CITY ORDERS.—It is competent for the city, in such contracts, to agree to pay in city orders at par, that part of the cost of any improvement which is charged against the city.

CONTRACT—MODIFICATIONS OF.—It is clearly competent for the city, by the common council, to permit changes or modifications of the contract, without impairing the rights of the contractor to collect the expense of the improvement.

ORDINANCE.—An ordinance is not necessary to authorize the making of ordinary street improvements by the city.

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APPEAL from the *Allen Common Pleas*.

WORDEN, J.—A petition was filed before the common council of the city of *Fort Wayne*, asking for the construction of a certain sewer within the city. The petition purported to be signed by the owners of more than two-thirds of the whole line of lots bordering on the streets and alleys along which the proposed sewer was to run. The common council granted the prayer of the petition. The street committee was instructed to advertise for sealed proposals for the construction of the sewer. Proposals were received, and the contract was awarded to *Silvers*, the appellee. The street committee was authorized by the common council to enter into a contract with *Silvers* for the construction of the work, which was accordingly done. By the terms of the contract the city was to pay *Silvers* for such portion of the work as was occupied by the crossing of streets and alleys, in city orders at par; and for the residue he was to look to the owners of the property bordering on the streets along which the work was to be constructed. The contract seems to have been drawn in accordance with sections 66, 67 and 68 of the act for the incorporation of cities, &c. 1 G. & H. 233.

The sewer was constructed by the appellee and accepted by the common council, and an assessment was duly made upon the owners of the property bordering on the streets along which it was constructed. The county of *Allen* was assessed on her public square fronting on the street on which the sewer was constructed; and failing to pay, a precept was issued for the collection thereof, as provided for in section 69 of the act above cited. An appeal was taken by the county, as provided for in the section of the statute last cited, and in the *Common Pleas* there was a trial, finding, and judgment for the appellee.

The county appeals, and makes several points on which it

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is claimed a reversal should be had. We will notice the points made in the briefs of counsel for the appellant.

The first and indeed the main question arising in the case, is whether the city has a right to construct a sewer, and assess the expense of it to the property owners along the line of it.

The 59th section of the act above cited provides, amongst other things, that: "The common council shall have exclusive power over the streets, highways, alleys and bridges within such city, and to lay out, survey and open new streets and alleys, and straighten, widen and otherwise alter those already laid out, and to make repairs thereto, and to construct and establish side-walks, crossings, drains and sewers."

Here is ample power conferred upon the common council, not only to lay out new streets and alleys, but to improve the old ones, including the construction of side-walks, crossings, drains and sewers. This section, however, does not authorize the expense of such improvement to be assessed to the property holders along the line of the improvement. But the following sections are to be construed in connection with the foregoing:

"Sec. 66.. When the owners of two-thirds of the whole line of lots, bordering on any street or alley, in any city, or a part of any street or alley not less than one whole square between any two streets crossing the same, and measuring only the front line of such lots as belong to persons resident of such city, shall petition to the common council to have the side-walks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for a full improvement in general, or for lighting such city, according to the general plan of improvement in said city, the common council may cause the same to be done by

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contract given to the best bidder, after advertising to receive proposals therefor.

"SEC. 67. In all contracts specified in the last preceding section, the cost of any such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot, and the city shall be liable to the contractors for so much thereof only as is occupied by the crossing streets or alleys, or by public grounds of the city bordering thereon; and the owners of lots bordering on such streets or alleys, or the part thereof to be improved, shall be liable to the contractor for the proportion of the costs, in the ratio of the front line of the lots owned by them to the whole improved line: *Provided*, that when the owner of any lot shall have made any improvement in front of his lot, in accordance with the general plan for the improvement of such streets, and under the direction of the city engineer, he shall be entitled to a reasonable allowance therefor, upon his proportion of the cost of such improvement, which reasonable allowance shall be determined by the said engineer.

"SEC. 68. When any such contract shall be made, or shall have been heretofore made, and shall be in progress of fulfillment, the common council shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to require such amount to be paid to him, deducting a reasonable per centage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time within which the same shall be finished; and such estimates shall be a lien upon the ground upon which they are assessed, to the same extent that taxes are a lien, and shall have the same preference over other demands. The common council, with the concurrence of two-thirds of the members thereof, may cause any or all of the

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improvements mentioned in the preceding section, and repairs of any kind of streets and alleys to be made in like manner, without such petition, and either charge or cause any or all of the expenses thereof to be assessed and collected, as heretofore provided when petition is made, or, if deemed just and right by the common council, to cause such expense, or any part thereof, to be paid out of the general revenue of the city."

The 69th section provides for the collection of the assessment made upon the owners of property bordering on the street on which the improvement is made, by precept to be issued for that purpose, and for an appeal from the precept to the Court of Common Pleas, where the cause is to be tried as other causes. "*Provided*, that no question or fact shall be tried which may arise prior to the making of the contract for said improvement upon the order of the council. The clerk, (of the city,) upon the filing of said bond, (the appeal bond,) shall forthwith make out and certify, under his hand and official seal, a full, true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, order of council, records and other papers filed in said matter, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule; and in case the Court or jury shall find, upon trial, that the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then the said Court shall direct the property to be sold and conveyed by the sheriff thereof, as the said clerk is here-

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inafter directed to sell convey property liable for street improvements. *Provided*, that nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvement," &c.

These provisions have been set out at large, in order not only to show the scope of legislation bearing on the question of power in the common council to build sewers and assess the expense to the property owners along the streets and alleys in which they are built, not including the expense of building them across streets and alleys, or along public grounds of the city, but also as furnishing a solution to some other questions arising in the case.

We have seen that, by section 59, the common council is empowered, amongst other street improvements, to construct drains and sewers. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits they are to be favored by the Courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction." *Kyle v. Mulin*, 8 Ind., 34. What is meant by the language of the 66th section: "Shall petition to the common council to have the sidewalks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for a full improvement in general, or for lighting the city, according to the general plan of such improvement in said city"? We think that the words, "or for either kind of improvement, or for a full improvement in general," have reference to any and all the improvements authorized by the 59th Section, and include sewers. The words should be construed to have reference only to such improvements as the city is authorized to make, and the section indicated above shows what those improvements are. This is not only the natural, but it

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seems to us to be the just interpretation of the statute. If the words indicated do not add anything to what was previously provided for in the same section, viz: the power to grade and pave the sidewalks and streets, they are tautological and useless. If they add something more, which we think they do, they must have referred to such improvements as may legally be made, and this is determined by the 55th section. The power to construct sewers is undoubted, and the expense thereof should be borne by those who are benefited by them. Taking the provisions of the statute together, we have no doubt of the right of the common council to construct sewers, and assess the expense thereof to the owners of the property, as provided for in the sections above set out.

We proceed with the other questions in the cause. It is objected that "it nowhere appears in the record that the owners of two-thirds of the whole line of lots, resident, in such city, bordering on said streets, petitioned the common council to construct said sewer. It is not so stated in the petition, nor does it appear that there was any evidence before the common council showing that the persons who signed the petition were resident owners of two-thirds of the whole line of the lots, &c."

It does appear that the whole length of the sewer was 1512 feet; that the aggregate of all the crossings of streets and alleys was 884 feet, leaving 1178 feet to be charged upon the property holders. Double this line to include the whole line of the property on each side of the street, and we have 2356 feet. The persons who signed the petition purported to be the owners of more than two-thirds of the line, viz: 1825; and amongst them was the appellant, representing 314 feet, the amount on which the assessment was made.

But whether or not it appeared by proof before the city

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council that those who signed the petition were residents of the city, we are not informed by the record. But these are questions which the Court below could not inquire into. We have seen that on the appeal no question of fact could be tried which arose before the making of the contract. This provision of the statute was inserted for a purpose. That purpose was, undoubtedly, to enable the contractor to collect his money where he had done the work contracted for, without being harrassed with questions as to the regularity of the proceedings that took place before he entered into the contract, and to which proceedings he might be a stranger. If a party interested have reason to believe the proceedings, before the contract, were irregular or insufficient to authorize the contract and the doing of the work, he may enjoin them before the work is done; but if he withhold his objection until the work is done, there is no hardship in precluding him from going behind the contract and showing that by reason of any fact it was unauthorized. Whether the petition was signed by the requisite number of residents of the city, owning property bordering on the street on which the improvement was to be made, was a fact that could not be inquired into. But whether any petition had been filed at all would not seem to be material, as the council had power, by the concurrence of two-thirds of their number, to construct the sewer without petition, and assess the expense upon the property owners in the same manner as upon petition. Sec. 68. *The City of Indianapolis v. Mansur*, 15 Ind., 112. Whether two-thirds of the councilmen concurred in building the sewer, was a question of fact. The record shows how many voted for it, but it does not show how many constituted the council. For aught that appears two-thirds of the whole number concurred, but whether they did so was a fact that could no more be inquired into than any other fact transpiring before the contract

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was made. If there was no sufficient petition filed, and if two-thirds of the councilmen did not concur in the vote to build the sewer, the remedy of a party interested was by injunction. We should not wait until the contractor had built it, and then seek to avoid payment on such ground. *The City of Indianapolis v. Imberry*, 17 Ind., 175.

Another objection of the same character is made, viz: that one *Parks* was a better bidder for the work than *Silvers*, and therefore that the contract should have been awarded to *Parks*. The statute provides for letting the work to the "best bidder." Whether *Parks* or *Silvers* was the best bidder, was a question for the council to decide. The lowest bidder, is not always necessarily the best bidder. This was a question of fact that could not be inquired into on the appeal.

It is insisted, however, that that part of section 69 which provides that on an appeal no question of fact shall be tried which arose prior to the making of the contract, and that which provides for the manner of rendering judgment, are unconstitutional and void, on the ground, *first*, that the subject matter is not sufficiently expressed in the title, and *second*, that it is a special law on the subject of practice in Courts of justice.

The title, so far as it is necessary to set it out, is as follows: "An act," &c., "to provide for the incorporation of cities, prescribe their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as pertain thereto." Acts 1859, p. 207.

It is sufficient if the legislation in question is properly connected with the subject expressed in the title. *Reed v. The State*, 12 Ind., 641; *The State v. Adamson*, 14 Ind., 296; *Brandon v. The State*, 16 Ind., 197. In *Reed v. The State*, it was held to be "a salutary rule to construe a fundamental law strictly, yet if, in applying the usual rules of construction,

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doubt should still exist as to whether the enactment is in consonance with the fundamental law, we know of no safer guide than to let the co-ordinate branches of the government have the benefit of that doubt, and only declare an act unconstitutional by judicial decision, when it is manifestly so." We can not say that the legislation in question is not properly connected with the subject expressed in the title to the act. See, for illustration, the cases above cited. The subject expressed in the title, is, amongst other things, the powers and rights of cities, and the manner in which they shall exercise the same. Those powers and rights extend, as we have seen, to the construction of sewers, and the assessment of the cost thereof to the property owners. Properly enough connected with the subject, is the matter providing for an appeal from the proceedings, by a party interested, and the effect of such appeal. The provision that on the appeal no question of fact shall be tried which arose before the making of the contract, amounts, in substance, to this, that the appeal shall not have the effect of bringing in question anything done or omitted before the contract was entered into. The provision directing the manner of rendering judgment in the appeal is of more questionable character, but that may be regarded as stricken out without changing the effect of the law. Under the general provisions of the law, outside of that which specifically provides how judgment shall be rendered on appeal, the contractor would be entitled to a judgment for the sale of the property to make the amount of the assessment against it, where all the proceedings subsequent to the order of the council directing the work to be done have been regular, and where a contract for the work has been made and fulfilled, and where the assessment has been properly made; and such judgment would be carried into effect, and the sale made, by the proper officer of the Court to which the appeal is taken.

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The other objection, that the law is a special one on the subject of practice in the Courts of justice, is not well founded. The law is general and of uniform operation. It applies, to be sure, to only a class of cases, but that is no objection to it. *Reed v. The State, supra*; *Smith v. Doggett*, 14 Ind., 442.

Another objection is that the council cannot construct sewers without an ordinance. An ordinance was not necessary. *The City of Indianapolis v. Imberry, supra*; and if it were, whether they passed one or not before the contract was made, was a question of fact that could not be inquired into.

It is still further objected that the agreement on the part of *Silvers* to receive from the city, for that portion of the work occupied by the crossing of streets and alleys, city orders at par, was illegal, and rendered the contract void. We do not perceive anything illegal in this. No reason or authority is stated in support of the assumption that the transaction was illegal.

The only remaining objection to the proceedings is that *Silvers* failed to perform his contract, and hence that the assessment is void.

We are not able to see but that *Silvers* substantially performed his contract. By the terms of the contract the work was to be done "under the superintendence and final acceptance of the committee on streets, and civil engineer of the city." Some departures were made in the details of the work from the specifications in the original contract, but these departures were made under the direction of the street committee and engineer, and the work accepted by them and the common council, and the assessments were duly ordered to be made. We think it was clearly within the power of the common council to permit changes or modifications of the

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contract. Such changes or modifications, in some cases, become imperatively necessary; and when such changes are made, and the work done accordingly, and accepted by the common council, it can not be said that the contractor failed to perform his contract. Such performance fills the requirements of the law, that the work should be done "according to the contract."

There is no error in the proceedings below that should cause a reversal of the judgment.

Per Curiam.—The judgment is affirmed, with costs.

HANNA, J., dissents from this opinion.

William W. Carson, L. M. Ninde and R. S. Taylor, for the appellant.

Wm. H. Coombs, for the appellee.

THE CITY OF AURORA v. WEST.

The counsel for the appellant, in the case of *The City of Aurora v West*, ante, p. 88, file briefs embracing the following arguments:

The powers of cities and towns are generally those only which are of a municipal character; such as the laying out and regulating of the streets, providing for schools, water and gas, the building or renting of town houses, school houses, the laying out of public squares, the regulating the police of the city, &c., &c.

Nothing could be more foreign to our ideas of municipal powers generally, or of the powers of cities and towns, than the taking of

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stock by a small city like *Aurora* in such a rail road company as the *Ohio and Mississippi Rail Road Company*—a rail road which neither begins nor ends there, that barely touches the city as one of the way points or stations, and whose stock and costs is numbered by millions; and whose management is in the hands, not of the city authorities, or under the control of the citizens, but of a distinct board, sitting in distant cities in other States, and is regulated, not by the charter of the city of *Aurora*, but by the charter of the rail road company itself.

Corporate powers are strictly construed. Such companies are strictly confined to the powers to be found in their charters. The authorities upon this subject are many, and are from the highest Courts in this country and in *England*.

The rule upon the subject is thus expressed by the Supreme Court of *Pennsylvania*, in the case of *The Commonwealth v. The Erie and North-East R. R. Co.*, 27 Penn. 351.

Chief Justice *Black*, in giving the opinion of the Court in that case, says:

"That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in *plain* words or by *necessary* implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney General, or any body else, should complain against a company that keeps itself within bounds, which are always thus clearly marked; and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases, ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can avail you. A doubtful charter does not exist; because whatever is doubtful, is decisively certain against the corporation."

To the same effect are the following cases from the highest Courts in the country, and this doctrine is by no means new, and it flows directly from those fundamental principles of our government and

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polity, which place the powers of the government in the body of the people, and guarantee equality of rights and privileges. *Perine v. The Ches. and Del. Canal Co.*, 9 How. U. S. R. 184; *Charles River Bridge v. Warren Bridge*, 11 Pets. 557; *Parsons v. Goshen*, 11 Pick. 399; *Abendorth v. The Town of Greenwich*, 29 Conn. 365; *Bacon v. The Miss. Ins. Co.*, 31 Miss. 116; *Manly v. St. Helen's Canal and R. R. Co.*, 2 H. & N. Ex. 853.

It is also well settled that the powers of municipal corporations are more restricted and limited than those of ordinary trading or manufacturing corporations.

This is very evident from an examination of the numerous cases determined by the highest Courts of the country.

This is well expressed in Angell and Ames on Corporations:

"That they (school districts) are not bodies politic and corporate, with the general powers of corporations, must be admitted; and the reasoning advanced to show their defect of power, is conclusive. The same may be said of towns, and other municipal societies; which, although recognized by various statutes and by immemorial usage, as persons, or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law, yet are deficient in many of the powers incident to the general character of corporations. They may be considered, under our institutions, as *qua* corporations, with limited powers, co-extensive with the duties imposed upon them by statute, or usage; but restrained from a general use of the authority, which belongs to these metaphysical persons by the common law." Angell and Ames on Corp., p. 18. See also: *Buffalo v. Dodge*, 2 Denio 112; *New London, v. Brainard*, 22 Conn. 556; *Parsons v. Goshen*, 11 Pick. 399; *The Town of Petersburg v. Mapin*, 14 Ill. 194-5; *Starin v. The Town of Genoa*, 23 N. J. 449, 455; *City of Lafayette v. Cox*, 5 Ind. 39, 40; *Wythe v. Mayor of Nashville*, 2 Swan. 365; *Thompson v. Schermmerhorn*, 2 Seld. 92; *Reed v. The City of Toledo*, 18 Ohio 161; *Savannah v. Hartridge*, 8 Geo. 23; *Halstead v. The Mayor of N. Y.*, 3 Coms. 433; *Commonwealth v. Turner*, 1 Cush. 490; *State v. Ferguson*, 33 N. H. 430; *Colkins v. Hatch*, 18 Ohio 525; *Heise v. Town Council*, 6 Rich. 414; *City of Rochester v. Collins*, 12 Barb. 562; *Council of Charleston v. Condy*,

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4 Rich. 256; *Haywood v. The Mayor of Savannah*, 12 Geo. 409; *Buffalo v. Hodge*, 2 Denio. 111; *New London v. Brainard*, 22 Conn. 555.

Now if this be true of such acts as the celebrating the 4th of July and giving public dinners and receptions on such days, to building bridges and joining in the defence of the town, and in reference to those matters and things which relate solely to the city and its inhabitants, and to the police of such corporations, how much more do these rules hold as to such clauses as the 18th section of the city charter in question; for no one would at first thought conceive of its being a stockholder in a rail road from Cincinnati to St. Louis. *Starin v. The Town of Genoa*, 23 N. Y. 459; *Gould v. The Town of Sterling*, 23 N. Y. 464.

Now, although a rail road is a road, as was decided in the case of *West & Torrence v. The City of Aurora*, yet is it such a road as is described in the 2d, 3d and 6th paragraphs of the answer? Is such a road a road within the meaning of that section?

It seems to us such an idea would not occur to one upon reading that section, and it requires a very liberal interpretation and broad construction of that section to include such a road within its terms.

It seems to us to be inconsistent with the construction put upon such charters, so to construe this 18th section of the charter of the city of *Aurora*.

We insist that the road described and set out in the 2d, 3d and 6th paragraphs of the defendant's answer, is not such a road as is contemplated in and by the 18th section of the city charter.

The next question which we desire to consider, is that relating to the 4th paragraph of the answer. That paragraph is in these words:

"And for further answer herein, the said city of *Aurora* says that a majority of the qualified voters of said city did not at any annual election held in said city, prior to the time when said subscription was made by said city council, express upon their tickets that they were in favor of the subscription, by the city council of said city, of 50,000 dollars of the capital stock of the *Ohio and Mississippi R. R. Co.*, or of any amount of stock whatever in said company. And the defendants aver that the said *Charles W. West*, one of said plaintiffs,

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was at and before the time said subscription was made, and said bonds were issued and delivered to said company, a director in said company. Wherefore the said city of *Aurora* says, that the subscription made as aforesaid by the said city council, as set forth in said plaintiffs' complaint, was unauthorized and void, and the bonds and coupons issued thereon as aforesaid, unauthorized and void."

The demurrer admits these facts, and the sustaining it is a decision of the Court, that these facts are not a defence.

Upon this record, then, it had been determined before the trial that the defendants could not rely upon that paragraph for a defence, and they were not, therefore, bound to prepare to prove them, and were not permitted to prove them. The record, by the action of the plaintiffs below, did not permit the defendants to rely upon this question alone, and made the proof of these facts, as a defence, unnecessary and improper; and the question is, whether the facts set out in that paragraph are a defence?

Now, it is quite clear that the 18th section of the city charter gives no unconditional power, or unlimited power, upon the subject; and it is perhaps, somewhat difficult to see upon what ground it is that the Court sustained this demurrer. It could have been only on one of the following grounds that any conceivable argument could be made to sustain the action of the Court:

1. That the vote of the people was not a condition precedent, absolutely necessary before the city could take such stock and issue such bonds.

2. That the plaintiffs are *bona fide* purchasers in some such way that this defence can not be set up by the city against them.

3. That the defendants are estopped from setting up such defence, or,

4. That a vote of the majority of those voting, is all that is required by the charter to raise the power.

Neither of these positions is sound.

That the city had no power to take such stock until after a vote of the people was taken, and a majority of the qualified voters had signified their assent thereto, by expressing upon their tickets, at an annual election, that they were in favor of such subscription, is

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expressed as clearly as it possibly can be, in the 18th section of the city charter.

The section begins in these words:

"The said city council, whenever a majority of the qualified voters of said city require it, shall have power," &c.

This is clear, but the proviso is still more clear:

"*Provided*, That no such stock shall be subscribed on the part of the city, until a majority of the qualified voters thereof have signified their assent thereto by expressing upon their tickets, at an annual election, that they are in favor of the subscription of such stock by the city council," &c.

Then immediately follows the power to issue bonds to raise funds for the payment of such stock.

It was only for the payment of such stock, that the council could issue bonds, and nothing can be more clear than that this issue of bonds depended upon the subscription of stock made in accordance with the 18th section of the charter; and for this a majority of the qualified voters of the city must have expressed assent thereto upon their tickets at an annual election. *Starin v. The Town of Genoa*, 23 N. Y. R. 450; *Gould v. The Town of Sterling*, 23 N. Y. R. 459.

These things are indispensably necessary for the taking of such stock:

1. The majority of the qualified voters must express this assent.
2. It must be at an annual election, when the whole vote was more likely to be called out than at any special election.
3. The assent must be expressed upon the tickets. It must be in writing or printing.

All which provisions were exceedingly proper, and if they are not a condition precedent, it is difficult to see by what language such a condition could be created.

Were the plaintiffs in any better position than the *Ohio and Mississippi R. R. Co.*, to whom these bonds were given for the stock?

1. The bonds are made payable to the *Ohio and Mississippi R. R. Co.* or bearer.

This company was certainly bound to know that the city had no

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power to take this stock, or to issue the bonds, unless the majority of the qualified voters had thus expressed their assent thereto. They were also bound to know that the city was to sell the bonds to raise funds to pay for stock; for it may be that the bonds, having a long time to run, at six per cent., would sell for more than their face. They were to be sold to raise funds to pay for the stock, not handed over to the railroad company, at par, in payment of the stock. The citizens might have voted to take the stock, upon the idea that they could sell the bonds at par or above par, thereby furnishing the railroad company with that much money. Whereas, they might not have been willing to take stock and give their bonds therefor, if the railroad company was to sell them and get but $77\frac{1}{2}$ cents on the dollar for the same. See *Gould v. The Town of Sterling*, 23 N. Y. R. 459.

Now, these bonds were issued by a municipal corporation, having no general powers whatsoever, as an individual has, and being strictly confined to the powers granted. See *Gould v. The Town of Sterling*, *supra*.

This corporation exists by the laws of *Indiana*, and has no existence or powers out of or beyond that State. *Wheeler v. The Ohio and Mississippi R. R. Co.*, 1 Black. 296.

These bonds were executed in *Aurora*. They are payable to an *Indiana* corporation. They purport so to be. They bear this upon their face. They are therefore *Indiana* contracts, not only because executed in that State, but because executed by a municipal corporation of that State having no existence or powers out of such State.

2. Neither the bonds nor the coupons are bills of exchange. They are not promissory notes even. Nor are they payable at any bank within the State of *Indiana*.

They could not therefore be assigned and transferred, so as to cut off any defences which the city had to the same.

This is quite clear, and follows directly from the statute of *Indiana*. 3d section of the act of May 12th, 1852; 1st R. S. 1852, 378.

These bond are governed by the law of *Indiana*. They are made in *Indiana*; that is the *lex loci contractus*. Story on the Conflict of Laws, secs. 297, 298.

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They are made by a body having no powers out of or beyond that State. *Wheeler v. The Ohio and Mississippi R. R. Co.*, 1 Black. 296.

As to certain incidents, the law of *New York* would apply, but as to the nature of the contract, its construction, obligation, legal effect and operation, and as to the defences thereto, certainly, in the *Indiana* courts, these are governed by the law of *Indiana*. Story on the Conflict of Laws, sec. 555; *Cornegie et al. v. Morrison et al.*, 2 Met. 396.

3. Counsel for the plaintiffs below seem to be impressed with the idea that it is necessary for them to bring themselves under the law of *New York*, and they plead the law of that State.

We suppose the object is to show that the defences set up, though they might be pleaded against the railroad company, could not be against *West* and *Torrence*. The Court held that they could not.

In this the Court erred, as will appear from several considerations.

1. The laws of *New York*, set out in the complaint, can apply only to, and are intended to apply only to, notes made in *New York*. They do not apply to these bonds made in *Indiana* by one *Indiana* corporation and payable to another *Indiana* corporation. *Steamer J. P. Tweed v. Richard*, 9 Ind. 527; *Farnham v. The Blackstone Canal Co.*, 2 Sumn. 62; *De Witt v. Bennett*, 3 Barb. R. 96; *Miller v. Swan*, 27 Maine 521, 522; *Daniels v. Stevens, Lessee*, 19 Ohio 243; *Champion v. Jantzen*, 16 Ohio 97; *Steadman v. Patchin*, 34 Barb. R. 222; *Lewis v. Turner*, 2 Gibbs 354.

The law upon this subject is thus expressed by Judge Story:

"Every legislature, however broad may be its enactments, is supposed to confine them to cases and persons within the reach of its sovereignty.

In a few words, the same principle is well expressed in the case of *Steamer J. P. Tweed v. Richard*, 9 Ind. 527.

A careful examination of the law of *New York*, so far as it appears in the complaint, will show this.

The law of *New York* speaks of indorsements, among other contracts. Now it is well settled that the indorsement is governed by the law of the place where made, no matter where the contract is made or is payable. This shows that this law was not intended to cover contracts made in other States. *Dundas v. Bowler*, 3 McLean 397;

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Story on Conflicts of Laws, secs. 314 to 317; *Slocum v. Pomeroy*, 6 Cranch 224; *Hick v. Brown*, 12 Johns. 142; *Prentiss v. Savage*, 13 Mass. 24; *Powers v. Lynch*, 3 Mass. 80; *Potter v. Brown*, 5 East. 130.

This is true as to the drawer. *Hick v. Brown*, 12 Johns. 142; Story on Conflict of Laws, 315.

2. As to matters which may be set up in defence, these are a part of the remedy and are everywhere exclusively within the jurisdiction of the *lex fori*. Story on Conflict of Laws, sec. 555; *Dakin v. Pomeroy*, 9 Gill. 6; *Jones v. Jones*, 18 Ala. 251, 252; *Whittemore v. Adams*, 2 Cow. 63; *Potter v. Brown*, 5 East. 130.

As a municipal corporation of *Indiana*, the city derives all its existence and powers, and is subject to any liability from the *Indiana* law alone, and can not bind herself or be bound outside of it. *Halstead v. The Mayor of New York*, 3 Coms. 433.

When *West* sued the City of *Aurora* in the Courts of *Indiana* upon these bonds, made and executed in *Indiana*, and there delivered to an *Indiana* corporation, surely the law of *Indiana*, as to the matters of defence, is applicable, and not the law of *New York*. As has been stated, these laws of *New York* do not purport to apply to contracts made out of the State; but if they did, they could not hold in the Courts of *Indiana*, to deprive the City of *Aurora* of a defence which by the law of *Indiana* it was entitled to. *Allen v. The Merchants' Bank*, 22 Wend. 239, 240. See cases cited above.

3. Foreign laws are matters for pleading and proof, and till the contrary is made to appear by the party relying upon such laws, they are presumed to be the same as the *lex fori*. *Whidden v. Seelye*, 40 Maine 354; *Crosier v. Hodge*, 3 Louisiana 358; *Legg v. Legg*, 8 Mass. 101; *Leavenworth v. Brockway*, 2 Hill 202; *Holmes v. Brighton*, 10 Wend. 781; *Ward v. Morrison*, 25 Vt. 601, *Fauke v. Fleming*, 13 Md. 407; *Brown v. Gracey*, 16 E. C. L. 467.

Now, from anything in the pleadings and proof, it is not made to appear that the law of *New York* applies to contracts made out of the State, by municipal corporations existing in other States, even though the contracts be payable in *New York*. This does not necessarily appear in anything in the complaint.

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And nothing is to be inferred in favor of the pleading of any party. Gould on Pleading, sec. 169, p. 152; *Barr v. Hasseldon*, 10 Rich. Cr. 62; *Town of Weyford v. Town of Oxford*, 31 Vt. 461.

Much less does it appear in the proof. The proof is simply this, that the plaintiff gave in evidence the statute, which is set out in the plaintiff's complaint.

The Court will bear in mind that the point now under consideration is, whether there is anything in the complaint or in the evidence which should cut off the defences between the City of *Aurora* and the *Ohio and Mississippi Railroad Company* arising under the law of *Indiana*.

4. It is true that the rule, as generally stated, is that the law where the contract is to be performed or is payable, is to govern. This is generally true as to certain incidents of the contracts as against the maker or promissor. Such as the demand, protest, damages, and ordinarily as to the interest. And yet even as to these matters, there is much apparent confusion in the books; the rule is said to be, that as to interest and the consequences of usury, they will be governed by the *lex loci*, or the law where the money is to be paid, as the parties contemplated at the time; that evidence may be given upon this point and that the place where the contract is payable, is not the test. See Story on Conflict of Laws, secs. 297, 298, 299; *DePau v. Humphreys*, 21 Martin 1; *Chapman v. Robertson*, 6 Paige 634; *Brown v. Freeland*, 34 Miss. (5 George) 43, 44; *Russell v. Wiggin*, 2 Story 229, 230; *Carnegie v. Morrison*, 5 Met. 397 to 401; *Atwater v. Roslofson*, 2 Handy, Sup. Ct. of Cincinnati 28, 29.

The case of *Carnegie v. Morrison* is one which illustrates to some extent the remark above made, and shows with what narrow limits the exceptions to the general rule of the *lex loci contractus* are confined. In that case it appeared that *Messrs. Morrison & Co.*, a banking house in *London* and for which *Francis J. Oliver* was general agent in *Boston*, gave (by their said agent) a letter of credit to *John Bradford*, a citizen of *Boston*, in favor of *Messrs. Carnegie & Co.*, of *Gottenburg*, in *Sweden*, which *Bradford* forwarded to said firm in *Sweden*, in payment of a debt which he owed them. In the negotiations between said *Bradford* and *Oliver* in *Boston*, *Bradford* agreed

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to pay the usual commissions for such letters of credit, and the nature and object of the contract were fully understood between him and *Oliver*. *Carnegie & Co.*, in *Gottenburg*, drew drafts on *Morrison & Co.*, in *London*, in accordance with this arrangement, which not being accepted, suit was brought by *Carnegie & Co. v. Morrison & Co.*, in *Boston*. The case presented some of the difficulties which arise as to the law which shall govern.

The Court gave a most able opinion, and decided that in some particulars the laws of *Sweden* and *England* governed, but that the law of *Massachusetts* was the law which should generally apply to the transaction.

Chief Justice *Shaw*, in giving the opinion of the Court, says:

"What, then, is the law of the contract, or in other words, what law determines whether an act done constitutes a contract, and if so, between whom and to what effect? The general rule certainly is, that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitute a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation." Page 397.

* * * * *

"That the transaction now in question constituted a good contract to some purpose, and between some parties; that it was made on a good, valuable and adequate consideration, and made in *Massachusetts*, is not contested. Then the rule, *prima facie*, is that the construction and legal effect of this transaction are to be determined by the law of *Massachusetts*. This is the law which must be regarded, in the first instance, in deciding whether the act done constituted a contract, and, if so, between whom and to what effect; and must prevail, unless the case falls within some exception to the general rule; and the question is whether it does." Page 398.

* * * * *

"That some things are referred to foreign laws and usages, in this agreement, is manifest in the agreement itself. The words, 'on the usual terms and conditions,' are obviously of this character. They refer to the laws and usages both of *Sweden* and *England*." Page 399.

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"Upon these facts the Court are of opinion that the construction, the obligation, the legal effect and operation of this transaction, are to be governed by the law of *Massachusetts*." Page 400.

It is quite clear that as to the nature, validity, quality, legal effect, operation and construction of the contract, it must be governed by the *lex loci contractus*, and thus are all the authorities. There is some apparent confusion in the reported cases as to what falls under these terms, but we maintain that, in a case of this character, against a municipal corporation, the right to set up defences as between the original parties, under the law of *Indiana*, is governed by the law and not by the exception.

There is no estoppel by deed in *Indiana*. If there were, it would not apply to a case of this kind, for the bonds are executed by the mayor and clerk of the City of *Aurora*, whose powers depend upon the action of the council; and the powers of the council depend upon the assent of a majority of the qualified voters of the city.

The council, the mayor and clerk, are each and all of them special and limited agents, having but a few powers and they dependant upon this assent. Story on Agency, 126; *Gould v. The Town of Sterling*, 23 N. Y. R. 464; *Beck v. Allen*, 18 Johns. 366; *Munn v. Commission Co.*, 15 Johns. 54.

They have no powers without it, and clearly no powers to estop the citizens who are to bear the burden of taxation which the bonds call for.

They have no power even to assert that the majority of the qualified voters have thus assented, or to enter any such vote upon their records. And they have made no such entry. The entry produced is not that a majority of the qualified voters thus assented, but that a majority of those voting thus assented. And should the Court decide that the latter was equivalent to the former, before the plaintiffs can claim to estop the defendants by the same, they must show that they saw this order and relied on it. *Martin v. Angell*, 7 Barb. 409, 410; *McKune v. McMichael*, 29 Geo. 313, 314.

Parties dealing with municipal corporations, are bound to inquire into their powers, and take notice of the same. They can not plead ignorance of them. They must show them. Story on Ag., § 133, p. 151;

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23 N. Y. R. 464; *James v. The Cincinnati, Hamilton and Dayton R. R. Co.*, Cin. Law Gazette, for July 8, 1858.

In this case they are referred to this 18th section of the charter by the bond itself, and were bound to examine it.

An examination of it would show that the City Council had no power in the premises whatever, unless a majority of the qualified voters of the city had, at an annual election, required them to take such stock and issue the bonds. This being a condition precedent, they must see to it, that it was performed. Clearly the mayor, or clerk, or city council, deriving all their powers from said precedent vote, could not estop the city. They were not acting for or binding themselves, and it would be idle to apply the doctrine of estoppel to a principal, because of the unauthorized acts of an agent. See *Mechanics' Bank v. The N. J. & N. H. R. R. Co.*, 3 Kernan 638 to 641, where this is determined in relation to the noted *Schuyler* frauds. See, also, 23 N. Y. R. 464; *Halstead v. The Mayor of New York*, 3 Coms. 433.

A man may estop himself, because it would be a fraud in him to do the act, from the doing of which, for that reason, the law estops him. But it is because it would be a fraud committed by him upon the party, that he is estopped. The party setting up the estoppel must rely upon the acts to enable him to insist upon the estoppel. It is solely upon the grounds of fraud that this whole doctrine rests.

The law upon this point is well expressed in the case of *Martin v. Angel*, 7 Barb. Sup. Ct. R. 409.

In giving the opinion of the Court in that case, Judge *Marvin* says:

"Such estoppels are applied for the prevention of fraud, and only exist to prevent injury when equity and good conscience require that the party should not be heard to gainsay his acts or declarations by which another person has been influenced in his conduct. (Greenl. Ev., § 207.) To create an estoppel which shall preclude a party from alleging the truth, it must appear, 1. That he has made some declaration, or done some act, inconsistent with the truth, with a design to influence the conduct of another; 2d. That the party alleging the estoppel was ignorant of the truth, and relied upon and acted upon

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the faith of such acts or declarations; and, 3d. That an injury will result to him if the other party shall be allowed to gainsay them."

To the same effect are the following cases: 29 Geo. 313, 314; *Cummings v. Webster*, 43 Maine 194; *Taylor v. Ely*, 25 Com. 257; *White v. Langdon*, 30 Vt. 601; *Hill v. Epley*, 31 Pa. 334; *Lawrence v. Brown*, 1 Coms. 401.

This is very familiar law, and the authorities are numerous. Estoppels are odious in law, and are therefore strictly construed.

"Estoppels must be certain to every intent." 1 Greenl. on Ev., sec. 22; *Browman v. Taylor*, 2 Ad. and El. 289.

And estoppels *in pais* are only applied to prevent a fraud, and he who sets them up must show that some act or thing was done, or statement made to him by the party to be estopped, to induce him to act in a given way; that he relied upon such act or statement, and acted upon the faith of its truth, and will be defrauded if the party is permitted to set up the truth. 29 Geo. 313, 316.

If it is alleged that a resolution was passed by the council, he must show that it was presented to or shown him, and that he acted upon the faith of its truth, and must also show that the council had power to estop the city. 29 Geo. 313, 314.

When it is admitted that all power of the city or its council depended upon a given vote, it would be idle to claim that the action of the citizens could be estopped from showing the want of such a vote, by a resolution of the council. No such power exists in the council, much less in the mayor and clerk of the city. 23 N. Y. 464.

This last point was fully discussed in the noted case of *The Merchants' Bank v. New York and New Haven R. R. Co.*, 3 Kern. 638, relating to the *Schuyler* fraud. *Schuyler* was transfer agent of said railroad company, and as such had transferred, upon the transfer books of said company, a large amount of spurious stock, and this doctrine of estoppel was insisted upon. The Court says:

"The notion of estoppel, which has been advanced in the argument, not as a distinct ground of liability, but blended with other principles, deserves, by itself, very little consideration. Every corporate as well as private obligation or instrument undoubtedly contains an express or implied representation of facts, upon the faith of

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which innocent parties may deal. If it be a promissory note, value received is a fact expressed or implied; and although the fact may not be so, the maker is bound to pay the obligation in the hands of an innocent third party, not upon any theory of estoppel, but upon principles peculiar to that species of security."

* * * * *

"Now, by presenting the falsehood alleged in the certificate, and the consequent injury as the ground of the action, a plausible appearance is given to this view of the case. But it is essentially illogical. The falsehood, viewed in this aspect alone, really consists in a want of corporate power to enter into the engagement; and that, instead of being a cause of action, is a serious difficulty to be removed. If an agent, irrespective of all questions arising out of the special limitations of his own authority, as derived from the board of directors, can not bind a corporation, or affect the rights of its genuine stockholders by the terms of an over-issued certificate, there is great difficulty in affirming that the result may be indirectly reached by thus changing the ground of liability."

* * * * *

"Conceding that *Schuyler's* authority, derived from his appointment as transfer agent by the board of directors, might apparently include his fraudulent acts, the difficulty is only removed one step back. The directors themselves were not the corporation, but its agents only. It may be granted that they wielded all the corporate powers, but among those powers the one in question is no where to be found."

Where all power of the city council depended upon this vote, it is simply absurd to say that the council could bind the citizens by a resolution of their own, that such a vote had been taken. The right to pass any resolution upon the subject depended upon this vote.

Now I can readily admit that if the council had power, by the vote of a majority of the qualified voters of the city, to take the stock, but had neglected some circumstances required in their carrying out the subscription, of a directory nature, and which was not a condition precedent to the very power or authority itself in the premises, or had done such thing irregularly, that the city might be estopped from

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setting up the want of the formality or regularity of their proceedings. The distinction is between a condition precedent to any power in the premises whatsoever, and some want of regularity in carrying out the power after it has arisen and become vested.

This distinction is well recognized and often acted upon by judicial tribunals.

This is well expressed in the case of *James v. The Cincinnati, Hamilton and Dayton R. R. Co.*, in which case Judge Gholson gave a long and learned opinion.

This is part of the syllabus drawn up by himself:

"Powers conferred upon corporations are of two descriptions; some are general, others special and limited. Some have reference to the mode in which acts are to be done, and are merely directory; others are in the nature of a limitation of power or a condition precedent. Third persons, acting in good faith, are not usually to be affected by an excess or violation of the former, on the part of the company; but of the latter, they are. The act itself must be regarded as illegal, and knowledge is presumed."

This distinction has often been expressed and acted upon in a variety of ways. Among other cases and instances of it, see *Pearce v. The Mad. and Ind. R. R. Co., et al.*, 21 How. 443; *S. J. Railway v. G. N. Railway*, 9 Exch. 84; *Bargate v. Shortridge*, 31 Eng. L. & Eq. 53; *Beach v. Fulton Bank*, 3 Wend. 583; *Mayor of Norwich v. Norfolk R. R. Co.*, 4 Ell. & B. 418, 419; *E. A. Railway v. E. C. Railway Co.*, 73 Eng. C. L. 812; *Kearney v. Andrews*, 2 Stock. Ch. 74; *State v. Porter*, 7 Ind. 206; *Pond v. Negus*, 3 Mass. 232; *Marchant v. Langworth*, 6 Hill 647; *Ex. Parte Heath v. Rooms*, 3 Hill 47; *Colt v. Evcs*, 12 Coms. 254-5; *Siker v. Kelley*, 7 Hill 24; *Hooker v. Young*, 5 Con. 270; *Smith on State Const.* 784, *et seq.*

They have had no power given them to estop, or act at all, until a majority of the qualified voters of the city have assented thereto. This is a condition precedent to any power whatever upon the subject.

In this connection we desire to say a few words in addition to what has been heretofore said, in reference to two cases determined in the Supreme Court of the *United States*. They are *Bissell v. The City of Jeffersonville*, 24 How. 268; *Aspinwall v. Knox Co.*, Com. 21 How. 541.

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Although some of the remarks in these cases may seem to be at variance with the two cases above referred to, from the 23d volume of the N. Y. R., yet when they are carefully examined, it will be found that they are not in point.

The questions involved called for no such general remarks as were made, and they did not embrace the points now before the Court.

In the case of *Bissell v. The City of Jeffersonville*, an act of the Legislature of *Indiana*, had authorized its council to confirm the subscription, which it had done; and this is really the turning point of the case. It is repeatedly mentioned in the opinion of the Court. See pp. 291, 295, 297, 298.

In this case it also appeared that evidence of the required vote and of a confirmation of the subscription under the statute, were exhibited to the plaintiff, by the city officers having power to sell the bonds, when he purchased the bonds, and that he bought upon a belief of the truth of these papers. Pp. 292, 299. There was nothing of the kind in the case before the Court.

The case of *Aspinwall v. The Commissioners of Knox Co.*, was one not relating to the power of the commissioners, but to the regularity of the notice, and that notice was of a directory character, and not a condition precedent.

The question raised in this case was not at all involved in any way. There was no doubt that the people had voted for the subscription. This was not denied. The objection was to the regularity of the notice only, and upon the well settled principle heretofore referred to, the Court held that it could not be raised at so late a time and in such a way. In each of these cases, something is said as to the power of the commissioners in the one case, and of the council in the other, to pass upon this question under the authority given to confirm the subscription. In all of which particulars, and others, the cases are clearly distinguishable from that now before this Court, and from the *New York* cases above referred to.

As bearing upon the question of power in the city of *Aurora*, and upon the estoppel, we refer the Court to the case of *Mitchell v. The Rome R. R. Co.*, 17 Geor. 589.

In that case the Court says:

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"Doubtless, if this payment were a condition precedent to organization, the acts done by the company, unless this condition had been complied with, would be void; and void, notwithstanding any subscriber might have participated in them and given them his sanction, or might have taken part in any pretended organization. To this effect is the decision of this Court in *Napier et al. v. Poe et al.*, 12 Geor. R. 184, a case in which the payment in of a certain per cent. by the subscribers for stock, was a condition precedent to organization or to the right to do business."

For a case containing some of the distinctions upon this question of estoppel, we will here also refer the Court to the case of *Gardner v. Greene*, 5 R. I. 109, 110.

This is from the opinion of the Court in that case:

"Of course, a deed poll can never operate by way of estoppel by deed, against the grantee, for the simple reason that his seal is not to it; Co. Lit. 47 b, 363 b; nor, in consequence, as such an estoppel against the grantor; since, to exist at all, an estoppel of this sort must be mutual and reciprocal. Co. Lit. 352 a; *Grant v. Wainman*, 3 Bing. N. C. 69; S. C. 32 Eng. C. L. R. 42; *Small v. Proctor*, 15 Mass. 495, 499; *Moore v. Eastman*, 5 N. H. 490; *Lansing v. Montgomery*, 2 Johns. R. 382; *Osterhaut v. Shoemaker*, 3 Hill 519; *Sparrow v. King*, 1 Comst. (Appeals) R. 248; *Gardner v. Sharp*, 4 Wash. C. C. R. 609; *Miles v. Miles*, 8 Watts & Serg. 135; *Bolling v. Mayor*, 3 Rand. (Va.) R. 463; *Candler v. Lansford*, 4 Dev. & Bat. (N. C.) R. 407. It is equally well settled, that an estoppel *in pais* is created by the acceptance of possession under a deed, only when the deed is accepted in one of those relations which imply an obligation to return the possession, and a sort of allegiance to him under whom, or in subjection to whose interests, it is held; such as in the relation of landlord and tenant, trustee and *cestui que trust*, mortgagor and mortgagee. *Per Baldwin, J., Williston v. Watson*, 3 Pet. 47, 48; *Blight's Lessee, v. Rochester*, 7 Wheat. 548; *Watkins v. Holman*, 16 Pet. 53, 54. Even in one of these relations, as of landlord and tenant, it exists only when possession has been received under the lease, and does not continue after the landlord's title has determined, or the tenant has been either actually or constructively evicted. *Dec v. Barton*, 11 Ad. &

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El. 307; S. C. 39 Eng. C. L. R. 99; *Doe v. Smith*, 4 M. & S. 347; *Doe v. Edwards*, 5 Barn. & Ad. 1065; *Doe v. Mills*, 2 Ad. & El. 17; *Doe v. Birchmore*, 9 Id. 662. It is an extension of such an estoppel quite beyond its reason, to apply it to the ordinary relation of grantor and grantee, where the latter, claiming by virtue of his own purchased right, and having paid his money for his title, is under no obligation whatever to his grantor, or to the widow claiming by virtue of his grantor's seizin, in regard to it. As said by Mr. Justice *Wilde*, (*Small v. Proctor*, 15 Mass. 499,) "The grantee may be permitted to show that his grantor was not seized, as is every day permitted in actions of covenant."

Indeed, it would seem little short of an absurdity to hold, that a party receiving possession under a deed is equitably estopped, as long as his possession continues, to deny the seizin of his grantor, because, along with the possession, he took covenants of warranty to guard him, as far as damages might, against the contemplated possibility that his grantor might not ultimately prove to be entitled to that which he affected to convey. And see *Smith v. Strong*, 14 Pick. 148; *Barker v. Tulman*, 2 Metc. 32; *Osterhaut v. Shoemaker*, 3 Hill, 519; *Sparrow v. Kingman*, 1 Comst. (Appeals) R. 252, 254; *Kenada v. Gardner*, 3 Barb. Sup. Ct. R. 589.

This case might be supported by numerous others. It shows within what narrow limits the doctrine of estoppel is confined.

The Court also erred in allowing interest upon these coupons, and especially so in allowing 7 per cent. interest.

This question is raised upon the motion for a new trial, and the exceptions taken to the overruling thereof.

We deny that any interest was due upon these coupons. They are not, and do not purport to be separate and distinct contracts. They purport upon their face to be interest warrants, attached to a bond, which is the principal contract. Though in form a promise to pay, yet they are not executed as separate contracts, but each one purports to be an interest warrant to the bond which is specified in the coupon itself.

They are put in this form, not as separate contracts, but for convenience in collecting the interest. And it has been held that they

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could not be sued upon by any party not holding the bond. *Wright v. The Ohio and Mississippi R. R. Co.*, in the Superior Court of Cincinnati, per Gholson, J.

Being interest warrants, it is doubtful, to say the least of it, whether in *Indiana*, any recovery could be had upon them by any one not also holding the corresponding bond. *Comparet v. Ewing*, 8 Blackf. 328.

Whether a recovery could be had upon them by a party not holding the corresponding bond is one question. It is a very different question whether interest is due upon them, as they give notice upon their face that they are themselves the interest upon another contract, and interest upon them would be interest on interest, which would be illegal. *Niles v. The Board, &c.*, 8 Blackf. 158; *Tillcotson v. Preston*, 3 Johns. 229; *Williams v. H.*, 3 Cow. 87; *Dixon v. Parkes*, 1 Esp. 110, 111; *Ex Parte Bevan*, 9 Ves. 224.

This is the law both of *Indiana* and *New York*. The law of *England* is the same, and the law of many of the States is also to the same effect.

Now, these coupons are but the interest due from time to time upon the corresponding bonds, and being incidental with the original contract, made in this form to be detached for the convenience of the holder in collecting the interest in a distant city, there can be no interest upon them; that would be compound interest, which is not permitted either in *Indiana* or *New York*. *Niles v. The Board, &c.*, 8 Blackf. 158; *Grimes v. Blake*, 16 Ind. 160; *Boyer v. Pack*, 2 Denio 108; *Toll v. Hillier*, 11 Paige 231; *Foreman v. Foreman*, 17 How. Pr. 257; *Ex Parte Bevan*, 9 Ves. 223.

Indeed, under the law of *New York*, in which State these coupons and bonds were payable, a person having paid compound interest under an idea of both parties that the interest was properly calculated, may be permitted to recover it back.

It was so held in 1844 by the Supreme Court of *New York* in the case of *Boyer v. Pack*, 2 Denio 108.

These decisions in *New York* come down many years since the passage of the act referred to in the complaint, and they show that such is the law of *New York*

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The law of *New York*, as set out in the complaint, is expressed in the usual language of such laws, the same precisely as that in the *Indiana* act relating to the subject. The fact that these are separate coupons, does not make the contract, in legal effect, different. The bond itself shows that it is the interest payable annually—nothing more, and the coupons are to the same effect.

Interest upon such coupons, or upon the annual interest falling due, can not be contracted for, even at the time the original contract is made. It is against the policy of the law to permit it. *Niles v. The Board, &c.*, 8 Blackf. 158; *Mowry v. Bishop*, 5 Paige 102; *Van Beuschooten v. Lawson*, 6 Johns. Ch. 313, 314; *Toll v. Hillier*, 11 Paige 231; *Foreman v. Foreman*, 17 How. Pr. 257; *Grimes v. Blake*, 16 Ind. 160.

It requires an agreement made in writing, after the interest becomes due, to make it legal.

But if any interest were due and recoverable upon these coupons, the Court erred in allowing 7 per cent. to be recovered. The contract being made in *Indiana*, is governed by *Indiana* law as to its obligation, nature, legal effect, operation, validity and construction. Story on Conflict of Laws, sec. 297.

Whether it draws 6 or 7 per cent. is certainly a matter of legal effect, operation or construction.

But it matters not whether it be governed by the *New York* law or by the law of *Indiana*. If the interest is due at all upon the coupons, it must follow the interest contracted for in the contract itself. This is 6 per cent., which is legal according to the law of *New York*. The incident follows the principal, in law as in logic.

And nothing is clearer than that these coupons are not original contracts in themselves, but are incidental acknowledgments of interest due from time to time upon the principal contract, and put in this form for the convenience of the holder in collecting the interest in *New York*, and as being a good form of receipt, not requiring any indorsement upon the bond. The convenience of this results from the fact that the bonds are payable at a distance, and run for many years.

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The coupon can be forwarded without the bond, and each one operates as a receipt to the party paying, and requires no indorsement upon the bond. Indeed when cut off the presumption is that it is paid, and thus the obligor is protected in that way.

There is no brief for the appellees in the record.

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AN INDEX

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Held, that there was no irregularity in the proceedings adjourning the term of the Court.—*Cordell v. The State*, 1

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5. PRACTICE—NEW TRIALS.—An appeal can not be taken from an order of the Circuit Court granting a new trial upon application made after the term, because such an order is merely interlocutory and not final.—*House v. Wright*, 383
6. APPEAL UNDER § 69.—Where an appeal is taken under this section, it not competent for the appellate Court to inquire whether the petitioners for the improvement were residents of the city; or whether the petition had been signed by the requisite number of persons owning property on the street; or whether two-thirds of the councilmen concurred in making the improvement without petition; or whether the contractor was the lowest and best bidder; or into any other fact which arose before the making of the contract.—*The Board of Commissioners of Allen Co. v. Silvers*, 491
7. SAME—CONSTITUTIONAL LAW.—That part of section 69, limiting the inquiry on appeal to facts which arose after the making of the contract, is constitutional and valid. *Ibid.*

APPRAISEMENT.

See SHERIFFS' SALES, 1, 2, 3.

ATTACHMENT.

1. **ATTACHMENT—PRACTICE.**—Where an issue is formed on an affidavit for attachment, it should be tried by the Court, or jury, with the issues in the cause in which the attachment is issued.—*Mopla v. Burnside*, 139
2. **SAME.**—But if the issue in the cause is first tried, and there is no objection interposed by the defendant, to the subsequent trial of the issue on the affidavit for attachment, he will be deemed to have waived the right which he had to insist upon a trial of the whole controversy at once. *Ibid.*
3. **PAYMENT BY GARNISHEE.**—If the Court have jurisdiction of the subject and the parties, a payment on execution under the judgment will protect the garnishee, though the judgment may have been irregular and reversible on error; and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment. The garnishee should see to it that the Court has jurisdiction.—*Richardson v. Hickman*, 244
4. **PRACTICE—WAIVER.**—Where the defendant appears in attachment suits the regularity of the attachment proceedings must be tried in such suits; and if the defendant, having appeared, makes no objection by motion or answer, their regularity will be deemed admitted, and all objections waived.—*Dunn v. Crocker*, 324
5. **PRACTICE.**—Objections to the regularity of attachment proceedings can not be first raised in collateral suits. *Ibid.*
6. **SAME—JUSTICES' COURT.**—The practice in attachment proceedings is the same in justices' as in the superior Courts. *Ibid.*
7. **UNDERTAKING IN ATTACHMENT.**—As to what undertaking in attachment proceedings will operate to release the attached property and authorize a personal judgment, see the opinion at length. *Ibid.*
8. **ATTACHMENT—REPLEVIN—AFFIDAVIT.**—In either of these forms of action, the affidavit may contain the requisites both of a complaint and affidavit, so as to dispense with any separate complaint. *Ibid.*
9. **PLEADING.**—In an action upon an undertaking in attachment, it is necessary to set out the undertaking and show that a case arose in which it was properly taken, but the proceeding in attachment need not be fully set out or made part of the complaint. They are not the foundation of the action. *Ibid.*

AUDITOR OF STATE.

1. **PLEADING—RELATOR.**—In actions to recover money due to the

State from a county treasurer and his sureties, the Auditor and not the Treasurer of State should be the relator.—*Pepper v. The State, &c.*, 399

BONDS.

See REPLEVIN. REPLEVIN BAIL. MUNICIPAL CORPORATIONS, 1, 2.
CITY OF AURORA v. WEST, 88, 503.

1. COUNTY TREASURER—DUTY OF—BREACH OF HIS BOND.—Under sections 2, 3, and 13, 2 G. & H. p. 640, and sections 123, 125, and 127, 1 G. & H. p. 68, it is the duty of the county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach of his bond, conditioned for the faithful performance of his duties.—*Halbert v. The State, &c.*, 126
2. PUBLIC OFFICER—LIABILITY OF FOR MONEYS.—A public officer who is required to give bond for the proper payment of money that may come into his hands, as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but his liability is fixed by his bond, and the fact that the money was stolen from him without his fault, does not release him from his obligation to make such payment. *Ibid.*
3. COUNTY TREASURER—BOARD OF COMMISSIONERS HAVE NO POWER OVER, TO DIRECT WHERE FUNDS OF STATE AND COUNTY SHALL BE KEPT.—A county treasurer is an officer who acts on his own responsibility, and independently of the board of commissioners of the county, so far as the keeping of the funds of the State and county is concerned. He is the proper custodian of the funds, and the board of commissioners have no legal authority to direct him where, or in what manner, the funds shall be kept. *Ibid.*
4. CONTRACTS—BOND—EXPRESS COMPANIES.—An action can not be maintained against the principal and surety upon a bond given by an Express agent to secure the faithful discharge of his duties to an Express company which carries on its business in the State of Indiana, without compliance with the requirements of the law of March 5, 1855, (1 G. & H. 327,) because, under the provisions of that law, the business of such company, so carried on is illegal. The parties to such bond are bound to know the law, and must be presumed to know that the requirements of the law have not been complied with by the company which were necessary to render the business legal.—*Daniels v. Barney*, 207
5. UNDERTAKING IN ATTACHMENT.—As to what undertaking in attachment proceedings will operate to release the attached property and authorize a personal judgment, see the opinion at length.—*Dunn v. Crocker*, 324

6. **APPEAL BOND—CONTRACT.**—Where an appeal is prayed from the judgment of a justice of the peace, within the time limited by law, and a bond signed by the surety but not by the principal, is filed and approved by the justice, the appellant is entitled to his appeal, and the subsequent withdrawal of the bond to procure its execution by the principal, and its absence from the files until after the expiration of the time limited for an appeal, could not divest the party's right to the appeal.—*Hollensbe v. Thomas.* 375
7. **OFFICIAL BOND—EXECUTION OF.**—Where an official bond is drawn up and certain names are inserted in the body of it as obligors, and a part only of such names are afterwards signed to it, the obligation will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so prepared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery.—*Pepper v. The State, &c.,* 399
8. **SAME.**—Where such a bond is presented to such a person for his signature, by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it. *Ibid.*
9. **SAME.**—Where such a bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicited by him, and he represents to them severally that, before its delivery he will procure the signatures of a certain number of other persons, as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and others sign it in consideration that such other signatures shall be procured, and such other signatures are not procured, these several classes of persons, in defence to an action upon such bond, may show these facts. *Ibid.*
10. **SAME—BOND OF COUNTY TREASURER.**—Where such bond is the bond of a county treasurer, it must be approved and accepted by the board of commissioners of the county, and if such board appoint no person as agent to procure its due execution, and on its presentation institute no examination into the mode of its execution or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval. *Ibid.*

CHAMPERTY.

1. CONTRACTS.—Where *A*, by power of attorney, constitutes *B*, a lawyer, his agent to secure and collect his interest in an estate, and, as a part of the same transaction, agrees to prosecute the claim for *A* for one-half of whatever of said estate he might so obtain, it being apparent that litigation in Court was contemplated for the recovery of said claim, such contract is champertous and void.—*Lafferty v. Jelley*, 471

CITY OF AURORA.

See CITY OF AURORA *v.* WEST, 88, 503.

CITY OF LAFAYETTE.

See TOLEDO, &C., R. R. Co. *v.* THE CITY OF LAFAYETTE, 262.

CITY OF NEW ALBANY.

See DEPAUW *v.* THE CITY OF NEW ALBANY, 204.

CITIES ORGANIZED UNDER GENERAL LAW.

1. TAXATION—MUNICIPAL LAW.—Cities organized under the general laws of the State, are authorized to levy an *ad valorem* tax on all property within the cities respectively, and subject to State and county taxation.—*The Toledo, &c., R. R. Co. v. The City of Lafayette*, 262
2. MUNICIPAL CORPORATIONS—POWER TO MAKE SEWERS, &C.—Under sections 59, 66, 68 and 69, of the general act for the incorporation of cities, it is competent for the common council of any city organized under that act to construct sewers, and assess the expense thereof upon the owners of the adjoining lots, in the same manner in which the expense of ordinary street improvements may be assessed.—*The Board of Commissioners of Allen Co. v. Silvers*, 491
3. SAME—STATUTES CONSTRUED.—The words, in section 66, “or for either kind of improvement, or for a full improvement in general,” have reference to and embrace all the improvements authorized by the 59th section of said act. *Ibid.*
4. SAME—APPEAL UNDER § 69.—Where an appeal is taken under this section, it is not competent for the appellate Court to inquire whether the petitioners for the improvement were residents of the city; or whether the petition had been signed by the requisite number of persons owning property on the street; or whether two-thirds of the councilmen concurred in making the improvement without petition; or whether the contractor was the lowest and best bidder;

or into any other *fact* which arose before the making of the contract. *Ibid.*

5. **SAME—CONSTITUTIONAL LAW.**—That part of sec. 69, limiting the inquiry on appeal to facts which arose after the making of the contract, is constitutional and valid. *Ibid.*
6. **STATUTORY CONSTRUCTION.**—Acts involving questions of constitutional law should be strictly construed, unless, on applying the usual rules of construction, doubt should still exist whether the enactment is constitutional, and, in such case, the doubt should be solved in favor of the action of the Legislature. *Ibid.*
7. **SAME—STATUTES CONSTRUED.**—That part of sec. 69 prescribing the form of judgment to be rendered on appeal may be unconstitutional, and may be regarded as stricken out without materially changing the law, because, under the general provisions of the same law, the contractor would be entitled to the same relief substantially. *Ibid.*
8. **CONTRACT—CITY ORDERS.**—It is competent for the city, in such contracts, to agree to pay in city orders at par, that part of the cost of any improvement which is charged against the city. *Ibid.*
9. **CONTRACT—MODIFICATIONS OF.**—It is clearly competent for the city, by the common council, to permit changes or modifications of the contract, without impairing the rights of the contractor to collect the expense of the improvement. *Ibid.*
10. **ORDINANCE.**—An ordinance is not necessary to authorize the making of ordinary street improvements by the city. *Ibid.*

COMMISSIONERS—BOARD OF.

See COUNTY TREASURER, 1, 2, 3. POOR, 1, 2.

1. **OFFICIAL BONDS TO BE APPROVED BY COUNTY BOARD.**—Where such bond is the bond of a county treasurer, it must be approved and accepted by the board of commissioners of a county, and if such board appoints no person as agent to procure its due execution, and on its presentation institute no examination into the mode of its execution or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval.—*Pepper v. The State, &c.*, 399
2. **SAME—DUTY OF COUNTY BOARD.**—In reference to such bonds it is the duty of the board of commissioners, before accepting or approving them, to ascertain that the sureties possess the qualifications required by law, and that the bonds were duly executed by these

whose names are signed to them, and that the sureties are in the aggregate worth enough to make the bond sufficient in that respect.
Ibid.

CONSTABLE.

1. EVIDENCE—SPECIAL CONSTABLE—APPOINTMENT OF.—The statute, 2 G. & H. 607, § 110, requiring the appointment of a special constable, by a justice of the peace, to be noted on the docket of such justice, such appointment can only be proven by the record.—*Benninghoof v. Finney*, 101
2. CONSTABLE'S SALES.—Where the record of a constable's sale is silent as to whether due notice was given of the sale or not, the Court will presume that the constable did his duty.—*Culbertson v. Milthollin*, 362
3. SAME—EXECUTION ON JUSTICE'S JUDGMENT.—Where a constable levies upon property to satisfy an execution from a justice's Court, and advertises it for sale, but fails to sell, and returns the writ, with his proceedings indorsed thereon, and the justice issues another execution, and fails to append to it a copy of the return made to the first, his failure so to do will not render the second execution void, but only voidable, and it might be set aside on motion before the justice, but if no such motion was made, all acts done under it will be valid. *Ibid.*

CONSTITUTIONAL LAW.

1. LANDLORD AND TENANT.—The 12th section of the act entitled "an act concerning the unlawful detention of lands, and the recovery thereof," 2 G. & H. 630, is within the title of said act.—*Sturgeon v. Hitchens*, 107
2. TAXATION.—The right of the State to impose taxes upon the citizen, and the duty of the latter to pay the same, do not rest upon contract, but are limited only by the fundamental law of the State.—*DePauw v. The City of New Albany*, 204
3. TAXATION OF STATE PROCESS.—The provision of the internal revenue act of July 4, 1864, requiring writs in State Courts to be stamped is not within the sphere of the legislative powers of the Federal Government, and is inoperative.—*Warren v. Paul*, 276
4. HABEAS CORPUS.—Section 8 of Art. 1, of the Constitution of the United States contains a delegation to Congress of power to suspend the writ of *habeas corpus*. *Ibid.*
5. CONSTITUTIONAL LAW OF UNITED STATES.—1. At the adoption of the Constitution, all governmental power was in the States; and in the division of it made by the adoption of the Constitution, the Federal Government received only what was granted to it, the

States retaining the residuum, except so far as it was extinguished entirely by prohibitions upon the States.—*Thayer v. Hedges*, 282

6. SAME.—2. The prohibition of a power to the States did not of itself operate as a grant of the power to the Federal Government, but rather as an extinguishment of the power as a governmental one where a grant of it was not made in the Constitution to the Federal Government. *Ibid.*
7. SAME—LEGAL TENDER.—3. The power to coin money is one power, and the power to declare anything a legal tender is another, and different power; both were possessed by the States severally at the adoption of the Constitution; by that adoption, the power to coin money was delegated to the Federal Government, while the power to declare a legal tender was not, but was retained by the States with a limitation, thus: "Congress shall have power to coin money," &c. "No State shall coin money;" and "no State shall make anything but gold and silver coin a legal tender," &c. States, then, though they can not coin money, can declare that gold or silver, or both, whether coined by the Federal, or the Spanish, or the Mexican, or other government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the States were forbidden to make anything but coin a legal tender, a specie currency was secured in both the Federal and State governments. There was no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of Federal legislation. The money coined by it was the necessary medium. *Ibid.*
8. SAME.—4. The words delegating to Congress power "to coin money," regulate the value thereof, and "of foreign coin," do not include the right to make coined money out of paper. If they do, then the States have a right to make such money a legal tender. It does violence to the language to give it such a meaning. *Ibid.*
9. SAME.—5. The power to declare paper a legal tender is not incidental to any power delegated by the Constitution. *Ibid.*
10. POWER OF CONGRESS OVER CONTRACTS BETWEEN CITIZENS OF A STATE.—As to the power of Congress to enact laws impairing the obligation of contracts between the citizens of a State, see the opinion at length.—*Hopkins v. Jones*, 310
11. STATUTES CONSTRUED—CONSTITUTIONAL LAW—TEMPERANCE LAW.—Section 14, 1 G. & H. 617, is not embraced by the title of the temperance act, nor properly connected with the subject matter of it, and is therefore unconstitutional and void.—*Lauer v. The State*, 461
12. SAME.—That part of sec. 69 limiting the inquiry on appeal to facts

which arose after the making of the contract, is constitutional and valid.—*The Board of Commissioners of Allen Co. v. Silvers*, 491

13. STATUTORY CONSTRUCTION.—Acts involving questions of constitutional law should be strictly construed, unless, on applying the usual rules of construction, doubt should still exist whether the enactment is constitutional, and, in such case, the doubt should be solved in favor of the action of the Legislature. *Ibid*.

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CONTINUANCE.

1. CONTINUANCE.—An affidavit for a continuance stated that *F* would testify that *A* sold the lot in question to *G*, by title bond, and gave possession; that *G* transferred the bond and the possession to *C*, who settled, satisfied and fully discharged the full amount of the purchase money to *A*; that at the time of the sale of lot to the *T* company *A* was sent from the State, and his wife, *M*, was his constituted agent, having full authority from him to attend to and manage all his business; that she had full knowledge of the said sale, and of the payment by the company of the purchase money, and was, at the time, consulted by the agent of the company as to the title of *C*, and set up no claim for *A*, but by her conduct, actions and representations induced said agents to believe that *A* could set up no claim to the said lot; and that relying upon such silence, conduct and representations the company made the purchase and paid the money, &c.; that *F* was colonel of the 85th regiment in active service, and was then in the State of *Tennessee*; and that his deposition had not been taken, because, for more than six months, he had been moving from place to place in the discharge of his military duties, so that the defendant could have no assurance that he would remain at any one place sufficiently long to give reasonable notice to the plaintiff, &c.

Held, that as there was a paragraph of an answer, if not more than one, under which the proposed evidence would seem to have been legitimate, the continuance should have been granted.—*The Terre Haute, Alton, &c., R. R. Co. v. Norman*, 63.

2. PRACTICE.—An application for continuance, to obtain absent testimony, should show the exercise of reasonable diligence to obtain it before.—*Mugg v. Grover*, 236.

CONTRACTS.

See RESCISSION OF CONTRACTS, 1, 2. PLEADING, 2, 3. MORTGAGE, 4, 5. THAYER v. HEDGES, p. 282.

1. DEED—RATIFICATION—ADVERSE POSSESSION.—Suit for the recovery of land. The land was granted to *A* by a treaty between the United States and the Pottowattomie tribe of Indians, made October the 16th, 1826. U. S. Stat. at Large, pp. 295, 299. The grant, Art. 6, was in these words: "The United States agree to grant to each of the persons named in the schedule hereunto annexed, the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed, by either of the said persons, or their heirs, without the consent of the President of the United States." *A*, on the 13th day of June, 1836, without the consent or approval of the President, executed and delivered to *B* a deed conveying to him the land in dispute; but the deed thus made was afterwards, on the 14th day of December, 1846, approved by James K. Polk, the then President of the United States. When the land was thus conveyed by *A* to *B*, there was no adverse possession, but in 1843, *C* went into possession of the land, and at the time of the approval of the deed, by the president, held it adversely.

Held, that the deed from *A* to *B* could not, without the consent of the President, operate as a conveyance, but that his consent to its execution might be given before or after its execution.—*Ashley v. Eberts*, 55

2. *Held*, also, that the act of the President, in his approval of the deed, related back and gave it validity from the time of its execution, so as to protect *B* against the claim, by adverse possession, of *C*, which arose in the interim between the date of the deed and the date of its confirmation by the President, *Ibid.*

3. ACTION—INSURANCE.—A policy of insurance, which has not been executed, will not support an action; but if there was a valid agreement to insure and to issue a policy, an action may be brought upon such agreement.—*The Peoria Marine, &c., Co. v. Walser*, 73

4. POLICY OF INSURANCE—EXECUTION OF.—It was necessary to a complete execution of the policy of insurance, in this case, that it should be signed by the President and Secretary, and countersigned by the agent, *Ibid.*

5. **MARINE POLICY—COVENANT IN.**—Where, in a policy of insurance on a vessel, there is a stipulation "that the master and crew, so soon as practicable after the disaster and the property is secured or recovered, shall repair to the nearest convenient notary, and there make a protest setting forth the cause of said disaster as near as practicable, and the extent of the damages," such stipulation is a binding condition, upon the insured, and must be performed to entitle him to recover, *Ibid.*
6. **SAME—EXCUSE FOR NON-PERFORMANCE.**—Neither the want of knowledge of the master and crew that the vessel was insured, nor the casual remark of the agent of the insurance company, before the policy was issued, that if the owner insured he would send him, the master, word, which he failed to do, will excuse the performance of such stipulation. *Ibid.*
7. **SAME—WAIVER OF PERFORMANCE.**—The simple direction of such agent, to one of the crew, to go before an officer and make a protest, &c., is not a waiver of the legal right of the company to a legal protest in the case, *Ibid.*
8. **BOND—EXPRESS COMPANIES.**—An action can not be maintained against the principal and surety upon a bond given by an Express agent to secure the faithful discharge of his duties to an Express Company which carries on its business in the State of *Indiana*, without compliance with the requirements of the law of *March 5, 1855*, (1 G. & H. 327,) because, under the provisions of that law, the business of such company, so carried on is illegal. The parties to such bond are bound to know the law, and must be presumed to know that the requirements of the law have not been complied with by the company which were necessary to render the business legal. *Daniels v. Barney,* 207
9. **PAYMENT.**—Notes payable on specified days can not be sooner paid without the consent of the payee. Notes will not be presumed to have been paid before they become due.—*Ebersole v. Redding,* 232
10. **PRICE OF WORK.**—The price of work done in part under special contract, and in part under parol modification of such contract, should be controlled by the special contract so far as it is done in pursuance of it.—*Garver v. Daubenspeck,* 238
11. **MORTGAGE—FORECLOSURE BY STATE—STATUTES CONSTRUED.**—The summary foreclosure of school fund mortgages, which were executed to the State prior to 1852, and the sale of the mortgaged property, should be conducted according to the law in force at the time the contract was made.—*Hopkins v. Jones,* 310
12. **SALE—FRAUD.**—Where there has been a sale, and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee

- of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor.—*Harris v. Mercer*, 329
13. SALE OF LAND—RESCISSION OF.—Where *A* sells and conveys land to *B*, and the deed, before it is duly recorded, is lost, and *A* then sells and conveys the same land to *C*, who has full notice of the former sale and conveyance to *B*, the title in *B* is in no way impaired, and the conveyance to *C*, under the circumstances, is a nullity, and gives no right to *B* to rescind or recover back the purchase money paid to *A*.—*Harrington v. Finney*, 340
14. MUTUAL INSURANCE COMPANY—PREMIUM NOTES—CONTRACTS.—It is competent for a Mutual Fire Insurance Company, organized under the laws of this State, to provide in its articles of association, or by its by-laws, that all premium notes shall be paid in installments as ordered by the directors, after notice, and that if not so paid, the entire notes shall become due and collectable.—*The German Mutual Fire Insurance Co. v. Franck*, 364
15. CONSTRUCTION OF CONTRACTS.—As to where several contracts, made at the same time, in relation to the same subject matter, and based upon the same consideration, will be construed as one contract, see opinion at length.—*Judah v. Zimmerman*, 388
16. DISCHARGE OF SURETY.—Any material alteration of a contract, without the consent of the surety, will discharge him. The liability of a surety can not be extended beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, *Ibid.*
17. OFFICIAL BONDS—EXECUTION OF.—Where an official bond is drawn up and certain names are inserted in the body of it as obligors, and a part only of such names are afterwards signed to it, the obligation will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so prepared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery.—*Pepper v. The State, &c.*, 399
18. SAME.—Where such a bond is presented to such a person for his signature, by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it. *Ibid.*

19. **SAME.**—Where such a bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicited by him, and he represents to them severally that, before its delivery he will procure the signatures of a certain number of other persons, as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and others sign it in consideration that such other signatures shall be procured, and such other signatures are not procured, these several classes of persons, in defence to an action upon such bond, may show these facts. *Ibid.*

20. **CONTRACT—ACTION—MORTGAGE.**—Where *A* borrows money of *B*, and executes his note to *B*, and by deed conveys certain land to him, and takes from *B* a bond to re-convey the land on payment of the note, such transaction amounts *prima facie* to a mortgage, and if *B*, said bond not being recorded, sells and conveys said land to *C*, without notice of the nature of said transaction, for a sum much larger than the sum borrowed, *A* will be entitled to recover of *B* the difference between said sums.—*Crassen v. Snoveland*, 427

21. **LEASE OF WATER POWER.**—Where successive leases of water power on the *Wabash and Erie Canal* are executed by the trustees thereof to different persons, and the water in the canal proves insufficient to supply the requisite amount to all the lessees, but is sufficient to supply some of them, the lessees should be supplied in the order in which the leases are executed.—*The Board of Trustees, &c. v. Reinhart*, 463

22. **LEASE—CHATTEL MORTGAGE—ESTOPPEL.**—*A* and *B* executed a lease to *C*, of certain land for seven years, at an agreed rent, upon which *C* agreed to erect certain buildings and to carry on certain business, which buildings *C* should own and be entitled to remove at the end of the term, and, to secure the payment of the rent, said buildings were declared in the lease to be mortgaged to *A* and *B*. The latter signed and acknowledged said lease, on May 29, 1857, and *C* did so on July 9, 1857, at which time said buildings had been erected on said premises, and on July 10, 1857, it was recorded in the mortgage record of the county. *D* was subscribing witness to the execution of the lease by *C*, and, by an arrangement subsequently made between him and *C*, he became the prospective owner of the improvements to be erected by *C* on the land.

Held, 1. That *D* was estopped by his own acts to deny the ownership of said lease and improvements by *C*, or his right to encumber them by liens, and all persons claiming under, or through *D*, were bound by that estoppel, as to liens created as above, unless they can show fraud or want of consideration.—*Blakemore v. Taber's Ex'rs.*, 466

23. *Held*, 2. That *A* and *B*, to the extent to which they had the first lien on said improvements, under the terms of said lease, could enforce it by foreclosure, against *D*, and those claiming under or through him, said lease, as to said lien, being equivalent to a mortgage. *Ibid.*
24. *Held*, 3. That said lease in its character of mortgage, was not void for uncertainty, the property mortgaged being on the premises of the mortgagees, and to that extent in their possession and identified, and said mortgage being recorded. *Ibid.*
25. CHAMPERTY.—Where *A*, by power of attorney, constitutes *B*, a lawyer, his agent to secure and collect his interest in an estate, and, as a part of the same transaction, *B* agrees to prosecute the claim for *A* for one-half of whatever of said estate he might so obtain, it being apparent that litigation in Court was contemplated for the recovery of said claim, such contract is champertous and void.—*Lafferty v. Jelly*, 471
26. ILLEGAL CONTRACT—RESCISSION.—A party to an illegal executory contract may rescind or repudiate it, and an executed contract subsequently made, inconsistent with it, will amount to a rescission or repudiation of it. *Ibid.*

CORONER.

1. CORONER'S FEES—STATUTES CONSTRUED.—The fees of a coroner for holding an inquest or making a *post mortem* examination, must be collected of the estate of the deceased person, and not merely of the property found with the dead body, unless such estate be insufficient to pay them, and in such case they may be collected of the county.—*The Board, &c., of Bartholomew Co. v. Bryan*, 397

CORPORATIONS.

See MUNICIPAL CORPORATIONS, 1, 2.

1. RAILROADS—ACCEPTANCE OF CHARTER—CONSTITUTIONAL LAW.—As to what acts on the part of the corporators constitute an acceptance of a special charter, see the opinion at length.—*The State, &c. v. Dawson*, 272
2. THE FORT WAYNE AND SOUTHERN RAILROAD COMPANY.—The corporators having accepted the charter before the Constitution of 1851 took effect, it became a valid and binding contract between them and the State, which could not be abrogated or impaired, except for cause. *Ibid.*
3. MUNICIPAL CORPORATIONS—POWER TO MAKE SEWERS, &c.—Under sections 59, 66, 68 and 69, of the general act for the incorporation of cities, it is competent for the common council of any city or

- ganized under that act to construct sewers, and assess the expense thereof upon the owners of the adjoining lots, in the same manner in which the expense of ordinary street improvements may be assessed.—*The Board of Commissioners of Allen Co. v. Silvers*, 491
4. **SAME—STATUTES CONSTRUED.**—The words, in section 66, "or for either kind of improvement, or for a full improvement in general," have reference to and embrace all the improvements authorized by the 59th section of said act. *Ibid.*
 5. **SAME—APPEAL UNDER § 69.**—Where an appeal is taken under this section, it is not competent for the appellate Court to inquire whether the petitioners for the improvement were residents of the city; or whether the petition had been signed by the requisite number of persons owning property on the street; or whether two-thirds of the councilmen concurred in making the improvement without petition; or whether the contractor was the lowest and best bidder; or into any other fact which arose before the making of the contract. *Ibid.*
 6. **SAME—CONSTITUTIONAL LAW.**—That part of sec. 69, limiting the inquiry on appeal to facts which arose after the making of the contract, is constitutional and valid. *Ibid.*
 7. **STATUTORY CONSTRUCTION.**—Acts involving questions of constitutional law should be strictly construed, unless, on applying the usual rules of construction, doubt should still exist whether the enactment is constitutional, and, in such case, the doubt should be solved in favor of the action of the Legislature. *Ibid.*
 8. **SAME—STATUTES CONSTRUED.**—That part of sec. 69 prescribing the form of judgment to be rendered on appeal may be unconstitutional, and may be regarded as stricken out without materially changing the law, because, under the general provisions of the same law, the contractor would be entitled to the same relief substantially. *Ibid.*
 9. **CONTRACT—CITY ORDERS.**—It is competent for the city, in such contracts, to agree to pay in city orders at par, that part of the cost of any improvement which is charged against the city. *Ibid.*
 10. **CONTRACT—MODIFICATIONS OF.**—It is clearly competent for the city, by the common council, to permit changes or modifications of the contract, without impairing the rights of the contractor to collect the expense of the improvement. *Ibid.*
 11. **ORDINANCE.**—An ordinance is not necessary to authorize the making of ordinary street improvements by the city. *Ibid.*

COSTS.

1. **APPEAL—COSTS.**—An administrator who is sued before a justice of

the peace on a claim against him in his fiduciary capacity, has a right, under § 64, 2 G. & H. p. 593, to appeal from the judgment rendered, though the justice had no jurisdiction of the cause; and the Court to which he appeals, in deciding the question of jurisdiction in his favor, should render judgment against the plaintiff for costs.—*Palmer v. Fuller*, 115

2. **STATUTES CONSTRUED—COSTS.**—Action by *A* against *B* for trespass in entering upon lands, and cutting and removing timber. *B* answered by, 1. A denial. 2. That he was the owner, &c., of the lands described in the complaint. *A* replied by a denial; and accompanied his reply with an affidavit that title to land was in issue, and a motion that the case be transferred to the Circuit Court. The motion was granted. The case was tried in the latter Court, and a judgment, on verdict, rendered in favor of *A*. *B* made a motion to tax all the costs which had accrued in the Common Pleas, except the costs of the summons and its service, against *A*. This motion was overruled, except as to the costs occasioned by the transfer. *B* appealed, and insisted that his motion should have been sustained.

Held, that section 11, 2 G. & H. p. 22, should be construed to give the Circuit Court some latitude of discretion in each case that may arise under the clause thereof wherein the word "may" occurs; and that, so far as appeared from the record, there was no abuse of a sound discretion, in the judgment as to costs, given by the Court.—*Allen v. Wells*, 118

3. **ADMINISTRATORS DE BONIS NON.**—In an action against an administrator *de son tort*, if the plaintiff recover 5 dollars or more in damages, he will be entitled to judgment for costs generally.—*Brown's Adm'r v. Sullivan*, 359

4. **SHERIFF'S LIABILITY FOR PRINTER'S FEES.**—A sheriff is not personally liable for printer's fees for advertising simply because he officially hands the advertisement to the printer, in the absence of special contract. The printer's fees may be collected as part of the costs in the case. And as the fee bill in the code does not fix the amount of the expense the sheriff may incur for advertising, the Court may do so, under the provisions in 1 G. & H. p. 338.—*Gardner v. Brown*, 447

COUNTY TREASURER.

1. **COUNTY TREASURER—DUTY OF—BREACH OF HIS BOND.**—Under sections 2, 3, and 13, 2 G. & H. p. 640, and sections 123, 125, and 127, 1 G. & H. p. 68, it is the duty of the county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach of his

bond, conditioned for the faithful performance of his duties.—*Halbert v. The State, &c.*, 126

2. **PUBLIC OFFICER—LIABILITY OF FOR MONEYS.**—A public officer who is required to give bond for the proper payment of money that may come into his hands, as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but his liability is fixed by his bond, and the fact that the money was stolen from him without his fault, does not release him from his obligation to make such payment. *Ibid.*
3. **COUNTY TREASURER—BOARD OF COMMISSIONERS HAVE NO POWER OVER, TO DIRECT WHERE FUNDS OF STATE AND COUNTY SHALL BE KEPT.**—A county treasurer is an officer who acts on his own responsibility, and independently of the board of commissioners of the county, so far as the keeping of the funds of the State and county is concerned. He is the proper custodian of the funds, and the board of commissioners have no legal authority to direct him where, or in what manner, the funds shall be kept. *Ibid.*
4. **EVIDENCE.**—A duly certified transcript, from the books of the county auditor, of the account current of the county treasurer during his term of service, is admissible in evidence under sec. 283 of the code, 2 G. & H. 183, against the treasurer and his sureties, in an action upon his official bond.—*Wells v. The State, &c.*, 241
5. **SAME—STATUTES CONSTRUED.**—Section 132, 1 G. & H. 103, is not inconsistent with section 283 of the code, *supra*, but is cumulative in its provisions. *Ibid.*
6. **COUNTY TREASURER AND AUDITOR.**—The account current kept by the auditor with the treasurer, is a public record, and if it is erroneously kept, the treasurer may, by proper proceeding, require its correction by the auditor. *Ibid.*
7. **BOND OF COUNTY TREASURER—EXECUTION OF.**—Where such bond is the bond of a county treasurer, it must be approved and accepted by the board of commissioners of the county, and if such board appoint no person as agent to procure its due execution, and on its presentation institute no examination into the mode of its execution or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval.—*Pepper v. The State*, 399
8. **DUTY OF COUNTY BOARD.**—In reference to such bonds it is the duty of the board of commissioners, before accepting or approving them, to ascertain that the sureties possess the qualifications required by law, and that the bonds were duly executed by those

whose names are signed to them, and that the sureties are in the aggregate worth enough to make the bond sufficient in that respect.
Ibid.

COUPONS.

See CITY OF AURORA v. WEST, 88, 503.

CRIMINAL LAW AND PRACTICE.

1. **INDICTMENT FOR MURDER.**—For a sufficient form of an indictment for murder, under the code, see the opinion.—*Cordell v. The State*, 1
2. **INSTRUCTIONS.**—It is error for the Court, in a criminal case, where there is any evidence tending to sustain different views of the case, to instruct the jury that they must limit their inquiries to a particular view or application of it.—*Longnecker v. The State*, 247
3. **JURISDICTION.**—Where the facts, which are necessary to give the Court of Common Pleas jurisdiction to try a felony, appear upon the information, it is not necessary that they should also appear upon the order book or in the judgment of the Court.—*Holland v. The State*, 343
4. **RECORD ON APPEAL.**—In a criminal case, the record on appeal to this Court needs not to set forth the steps preliminary to the impaneling, swearing and charging the grand jury.—*Behler v. The State*, 345
5. **As to the right in a defendant in a criminal case, who has pleaded guilty, to have a jury called to assess his punishment, see the opinion at length.** *Ibid.*
6. **ABATEMENT.**—A defendant is not allowed, in criminal cases, to plead in abatement that another indictment is pending against him for the same offence.—*Hardin v. The State*, 347
7. **SAME.**—Where a person is not under prosecution for an offence, but is still indicted therefor, he may plead in abatement of the indictment the disqualification of any of the grand jurors who found it. *Ibid.*
8. **SAME.**—Pleas in abatement in criminal cases should neither be uncertain, ambiguous nor repugnant. *Ibid.*
9. **SAME.**—No issue can be made by plea in abatement in criminal cases upon the fact whether grand jurors by whom an indictment was found were reputable or not. *Ibid.*
10. **STATUTES CONSTRUED—CONSTITUTIONAL LAW—TEMPERANCE LAW.**—Section 14, 1 G. & H. 617, is not embraced by the title of

the temperance act, nor properly connected with the subject matter of it, and is therefore unconstitutional and void.—*Lauer v. The State*, 461

11. STATUTES CONSTRUED—TEMPERANCE LAW.—Under the temperance law of 1859, 1 G. & H. 617, there is no penalty against a person, licensed according to the act, for selling on *Sunday*.—*Hingle v. The State*, 462
12. SAME—OVERRULED CASES.—The cases of *Thomasson v. The State*, 15 Ind. 449; *Sohn v. The State*, 18 Ind. 389, and *The State v. Thomasson*, 19 Ind. 99, are overruled, so far as the decisions therein are inconsistent with the decisions in *Hingle v. The State* and *Lauer v. The State*, *infra*. *Ibid*.

DAMAGES.

1. SAME—REPLEVIN BOND—DAMAGES.—In an action by the obligees against the obligors in a replevin bond, where the title to the property was not determined in the replevin suit, and the title thereto, and the right of possession are in a person, other than the obligees, they are only entitled to nominal damages.—*Stockwell v. Byrne*, 6
2. HIGHWAYS—MEASURE OF DAMAGES. Where land is alleged to be injured by the location and opening of a highway through it, the measure of damages will be the difference between its market value at the time with the highways and its market value without the highway.—*Sedener v. Essex*, 201

DEED.

1. DEED—DELIVERY OF—ONUS PROBANDI.—The possession of a deed is *prima facie* evidence that it has been legally delivered, and the *onus* of proving the contrary devolves on the person who seeks to set it aside.—*Berry v. Anderson*, ✓ 36
2. SAME—WHAT CONSTITUTES A DELIVERY.—To constitute a delivery of a deed there must be an intention to part with the control over it as its owner. *Ibid*.
3. SAME—ESCROW.—Where a deed is delivered to a third person to hold for the parties until the happening of a given event, it is called an *escrow*, and a delivery, by such person, to the grantee named in the deed, before the happening of the event, vests no title in him, and he can convey none. *Ibid*.
4. DELIVERY—TITLE.—Where a party delivers a deed, or property to another, with intent to convey to him, the title passes, even though the intention was raised by fraud or false pretences, but such title is voidable on account of the fraud, &c., though if such title is conveyed to a *bona fide* purchaser before avoidance, it becomes

in him a complete and absolute title. But where no title passes, the pretended purchaser can have none to convey, and there being no estoppel intervening, the original owner may reclaim.
Ibid.

5. ESCROW.—For a statement when, and the cases in which the question of the delivery of an instrument in writing as an *escrow*, or otherwise, arises, see the latter part of the opinion in this case.
Ibid.

DEMAND.

1. DEMAND—WIDOW.—A demand by a widow on the administrator of her deceased husband for the 300 dollars' worth of personal property allowed her by statute, 2 G. & H. 295, § 21, is in these words, "Squire, I have concluded to take my 300 dollars in property," is sufficient.—*Hamilton v. Matlock*, 47
2. SAME—REFUSAL.—Where an administrator refuses to deliver such property, on request, it is not necessary for the widow to make a specific selection of the articles she desires to take. *Ibid.*
3. Where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without demand, no demand is necessary before suit against him for such money.—*Catterlin v. Somerville*, 482

DEPOSITIONS.

1. CERTIFICATE—PRACTICE.—Where the certificate to a deposition states that the deponent "was sworn to testify the whole truth of his knowledge touching the matters in controversy in the cause," it should be held to be an immaterial deviation from the exact requirements of the statute in such cases.—*Welborn v. Swain*, 194
2. LEAVE TO RETAKE DEPOSITIONS.—It is competent for the Court on oral or written motion, to allow a party to re-examine witnesses, whose depositions have already been taken and filed in the cause, and are unpublished and unsuppressed; but such examination can not be made without leave of the Court.—*Addleman v. Swartz*, 249

DESCENT.

See WIDOW, 5

DIVORCE.

1. NEW TRIAL—DIVORCE.—A sued for and obtained a divorce from his wife, B, for reasons alleged, and held by the Court to be sufficient, and asked that certain property might be set off to her, which

the Court consented to and did order. Afterwards, at the same term at which the divorce was granted, and the order made, he moved the Court for a new trial, for other reasons of which he was not cognizant when the decree and order was made, and which would have enabled him, if known and disclosed, to have obtained the divorce without letting her have the property.

Held, that, under the circumstances of the case, the motion for a new trial was correctly overruled.—*Rindge v. Rindge*, 31

2. *See* in this connection also *Wooley v. Wooley*, 12 Ind., 663, and *McQuig v. McQuig*, 13 Id., 294.

DUE DILIGENCE.

1. **CONTRACTS—NOTES—DUE DILIGENCE.**—If the maker of a note be not liable to pay it, or if, from his want of means, no part of it could be collected of him by suit, no positive acts of diligence need be performed by the holder.—*Bernitz v. Stratford*, 320
2. **SAME.**—If the maker die a resident of the State in which he lived when the assignment was made, leaving property out of which the note or some part thereof might be collected, his estate, if the maker was liable when living, must be proceeded against before suing the assignor. *Ibid.*
3. **SAME.**—If the maker be alive, in the State where he resided when the assignment was made, and be liable on the note, and have any property subject to execution on a judgment against him, he must be sued before the holder can sue the assignor, but, if the maker become a non-resident after the assignment, the holder need not follow and sue him out of the State; nor, if he leave property in the State, is the holder required to proceed against it by attachment. *Ibid.*
4. **PROMISSORY NOTES—DUE DILIGENCE.**—Where the maker of a note dies before its maturity, and the note is then duly filed as a claim against his estate, and then his administrator resigns and no other is appointed, due diligence requires that the claimant on the note, in order to retain the liability of the assignor, should apply for the appointment of another administrator, or institute an action against the heirs of the estate and procure an order subjecting the property inherited by them to the payment of the note.—*Littler v. Page*, 337

ESCROW.

See DEED, 1, 2, 3, 4, 5.

ESTOPPEL.

See MORTGAGE, 8, 9, 10. THE CITY OF AURORA v. WEST, 88, 503.

1. SAME—CONSENT—APPRAISEMENT.—Where part of a judgment is directed to be collected without appraisal, and execution is issued thereon, and property of the judgment defendant levied upon, and such defendant consents that the officer having charge of the writ shall sell such property without appraisal, and the officer does sell the same without appraisal, such defendant is precluded from setting up the invalidity of the sale for that cause; and the purchaser at such sale, in the absence of actual fraud, acquires a good title to the property, as against third persons who are creditors of such defendant.—*Stockwell v. Byrne*, 6
2. ESTOPPEL—BONA FIDE PURCHASERS.—A man may be estopped by his acts from asserting title to land which he has not conveyed, as against a *bona fide* purchaser of such land, but the facts in this case do not constitute an equitable estoppel.—*Berry v. Anderson*, 36

EVIDENCE.

1. EVIDENCE—SPECIAL CONSTABLE—APPOINTMENT OF.—The statute, 2 G. & H., 607, § 110, requiring the appointment of a special constable, by a justice of the peace, to be noted on the docket of such justice, such appointment can only be proven by the record.—*Benninghoof v. Finney*, 101
2. CONTRACT—PAROL EVIDENCE TO VARY.—Where a note is executed by *A* to *B*, which is absolute and unconditional upon its face, and it is agreed between them at the time, by parol, that the note shall not be paid unless a certain other note, then transferred by *B* to *A*, could be set off by *A* against *C*, the payor of the latter, whom *A* owed at the time, and *A* fail to secure the set-off against *C*, and *B* sue *A* on his note, such parol contract can not be pleaded to show a failure of the consideration of the note of *A*, and such cotemporaneous parol agreement would not be admissible in evidence to contradict or vary the terms of the note.—*McClintic's Adm'r v. Cory*, 170
3. TRANSCRIPT FROM AUDITOR'S BOOKS.—A duly certified transcript from the books of the county auditor, of the account current of the county treasurer during his term of service, is admissible in evidence under section 283 of the code, 2 G. & H. 183, against the treasurer and his sureties, in an action upon his official bond.—*Wells v. The State, &c.*, 241
4. WITNESS—COLOR.—It is the duty of the Court to determine the competency of witnesses, and where the objection to the competency of the witness rests upon the allegation that he has such an

amount of negro blood as disqualifies him to testify, the Court may, upon inspection, determine *prima facie* his competency, but if his blood be not sufficiently apparent for such mode of determination, then the Court may examine other witnesses, either to prove the blood of the witness from reputation amongst those who knew him, or to establish the character of his blood by the testimony of experts.—*Nave's Adm'r v. Williams*, 368

5. EVIDENCE.—The best existing evidence of a fact must be produced to prove it; and, therefore, parol evidence of the contents of a record is not admissible; but, where the record or document is not a part of the fact to be proved, but is merely a collateral or subsequent memorial of the fact, parol evidence of such fact may be given.—*The Board of Trustees, &c. v. Reinhart*, 463

EXECUTION.

See JUDGMENT, 7. INJUNCTION, 3.

EXECUTORS AND ADMINISTRATORS.

1. APPEAL—COSTS.—An administrator who is sued before a justice of the peace on a claim against him in his fiduciary capacity, has a right, under § 64, 2 G. & H., p. 593, to appeal from the judgment rendered, though the justice had no jurisdiction of the cause; and the Court to which he appeals, in deciding the question of jurisdiction in his favor, should render judgment against the plaintiff for costs.—*Palmer v. Fuller*, 115
2. ADMINISTRATOR DE SON TORT.—Mere acts of kindness and charity, touching the property of a deceased person, such as taking care of it, feeding stock, providing for children, &c., will not constitute the person who does them an administrator *de son tort*.—*Brown's Adm'r v. Sullivan*, 359

EXEMPTION.

1. EXEMPTION OF PROPERTY—STATUTES CONSTRUED.—Section 3, 2 G. & H. p. 370, does not operate as an absolute exemption of 300 dollars' worth of property in favor of the debtor, without any acts on his part, but only relates to such real estate as had been duly exempted under the other provisions of the exemption law, before the execution of the sale or mortgage of the same by the husband without the consent of his wife.—*Sullivan v. Winslow*, 153

EXPRESS COMPANIES.

See BONDS, 4.

FEES OF OFFICERS.

See SHERIFF, 1.

1. CORONER'S FEES—STATUTES CONSTRUED.—The fees of a coroner for holding an inquest or making a *post mortem* examination, must be collected of the estate of the deceased person, and not merely of the property found with the dead body, unless such estate be insufficient to pay them, and in such case they may be collected of the county.—*The Board, &c., of Bartholomew Co. v. Bryan*, 397

FORFEITURE.

See HIGHWAYS, 3, 4.

FRAUD.

1. FRAUDULENT INTENT.—Whether a mortgage is given with a fraudulent intent is, under the statute, § 21, 1 G. & H., p. 353, a question of fact for the jury to determine.—*Maple v. Burnside*, 139
2. PLEADING—REPRESENTATIONS.—An answer to an action upon a note is sufficient, which alleges that the note was given in payment for the last installment on a stock of goods purchased of the plaintiff, which was represented to him at the date of purchase to be worth 3,500 dollars, and that it would invoice that amount or more; that the defendants were ignorant of the amount and value of the stock, and requested an invoice before purchasing; but the plaintiff said he had not time to make it, but assured them that he knew the goods would amount to more than 3,500 dollars; that the defendants purchased on this representation; but that it was false, and known to be so by the plaintiff when he made it; and that the goods, in fact, invoiced and amounted to but 1,500 dollars.—*Davis v. Jackson*, 233

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCE—CREDITORS.—*A* owned a tract of land, and with intent to defraud his creditors, conveyed it, without consideration, to *B*, who, to aid *A* in accomplishing his fraud, conveyed it, without consideration, to *C*. *C* mortgaged the land to the sinking fund for a loan of 500 dollars, which he received; *C* was a party to the purpose of *A* to defraud his creditors. The State received the mortgage made to the sinking fund, and made the loan in good faith. All of said conveyances, except the mortgage to the sinking fund, were set aside by a decree of the proper Court, and the land ordered to be sold, subject to said mortgage, for the benefit of the creditors of *A*. The land did not sell for enough to

pay them. Suit was then brought against *C*, to compel him to account for and pay over to *A*'s creditors the 500 dollars obtained by the said mortgage.

Held, that *C* was entitled to the money as against *A*, but held it in trust for the creditors of *A*, to whom he was liable to account and pay it over.—*Jones v. Reeder*, 111

GARNISHEE.

1. ATTACHMENT—PAYMENT BY GARNISHEE.—If the Court have jurisdiction of the subject and the parties, a payment on execution under its judgment will protect the garnishee, though the judgment may have been irregular and reversible on error; and a reversal of it by the defendant for irregularity, after payment by the garnishee, will not invalidate the payment. The garnishee should see to it that the Court has jurisdiction.—*Richardson v. Hickman*, 244

GUARDIAN AND WARD.

1. GUARDIAN AND WARD.—The requirement in the statute that, before any one shall be appointed guardian, he shall file a statement of the ward's estate, is directory only, and failure to file such statement would not of itself render an appointment void.—*Lee v. Ice*, 384
2. REMOVAL OF GUARDIAN.—Where a guardian is appointed by the Clerk in vacation, the Court, at its next term, without notice, may remove him and appoint another; but a guardian appointed by the Court in term, or by the clerk in vacation and afterwards approved by the Court, can not be removed by the Court without notice. *Ibid.*

HABEAS CORPUS.

1. HABEAS CORPUS.—Section 8 of Art. 1, of the Constitution of the *United States* contains a delegation to Congress of power to suspend the writ of *habeas corpus*.—*Warren v. Paul*, 276
2. JURISDICTION—CLERK.—The act of *January 3, 1852*, (2 G. & H. 304,) giving jurisdiction to the Clerk of the Circuit Courts to issue writs of *habeas corpus*, and to hear and determine them, is, by the subsequent legislation on the subject of *habeas corpus*, repealed, and such Clerks have now no such power.—*Gregg v. Wynn*, 373
3. PETITION FOR.—Where a guardian desires, by the aid of a writ of *habeas corpus*, to obtain the custody of his ward, he must make his letters of guardianship a part of his petition for the writ. *Ibid.*

HIGHWAYS.

1. MEASURE OF DAMAGES.—Where land is alleged to be injured by the location and opening of a highway through it, the measure of damages will be the difference between its market value at the time with the highway, and its market value without the highway.—*Sidener v. Essex*, 201
2. PRACTICE.—An order for the location and opening of a highway, should specify the width thereof; but where such a defect exists in an order, and does not conflict with the rights of an appellant to this Court, it will not be made the ground of a reversal, but the cause will be remanded to the lower Court for the correction of its order in that respect. *Ibid.*
3. STATUTES CONSTRUED—FORFEITURE OF ROAD CHARTER—CONSTITUTIONAL LAW.—The title of the act of March 5, 1859, 1 G. & H. 491, is sufficient to embrace a section authorizing the forfeiture of a charter as to a part of a road.—*The Central Plank Road Co. v. Hannaman*, 484
4. SAME.—Said act authorizes the forfeiture of less than the whole of the portion of any road which may be within any one county. *Ibid.*

INJUNCTION.

1. JURISDICTION—COMMON PLEAS—CIRCUIT COURTS.—The Court of Common Pleas has no jurisdiction to enjoin the execution of process issued out of the Circuit Court. It would seem that the statute, properly construed, requires that the Circuit Court and the Court of Common Pleas shall respectively enjoin, control and litigate with reference to their own process.—*The Indiana, &c., R. R. Co. v. Williams*, 198
2. PRACTICE—ILLEGAL TAX.—If illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction.—*The Toledo, &c., R. R. Co. v. The City of Lafayette*, 262
3. EXECUTION—INJUNCTION.—A recovered a judgment against two persons. The property of one has passed by purchase, under a junior lien, to another person, and the property of the other to another person by purchase. A seeks to enforce payment of the judgment by levy and sale of the property of the former, who seeks to enjoin the sale thereof until the property of the latter shall have been exhausted.
Held, that such sale ought not to be enjoined, because the principle of equity, authorizing the marshaling of securities in certain cases, does not apply in such a case.—*Sanders v. Cook*, 436

4. **TRUST—FORFEITURE—INJUNCTION.**—Where a lot is conveyed to trustees of a religious society, for the use of such society, according to the discipline, &c., and the society erect a church building thereon, and the trustees lease the basement thereof, which was made for a prayer room, to a teacher of a common day school, with leave to him to change the internal arrangements of the room to adapt it to his business, such trustees may be enjoined, on the application of members of the society, from such leasing.—*Perry v. McEwen*, 440

INSTRUCTIONS TO JURY.

See *STOCKWELL v. BYRNE*, 6.

1. **INSTRUCTIONS TO JURY.**—A party has no right to complain of an instruction given the jury which works no injury.—*Hamilton v. Matlock*, 47

INSURANCE.

See *ACTION*, 3.

1. **POLICY OF INSURANCE—EXECUTION OF.**—It was necessary to a complete execution of the policy of insurance in this case, that it should be signed by the President and Secretary, and countersigned by the agent.—*The Peoria Marine, &c., Co. v. Walser*, 73
2. **MARINE POLICY—COVENANT IN.**—Where, in a policy of insurance on a vessel, there is a stipulation "that the master and crew, so soon as practicable after the disaster and the property is secured or recovered, shall repair to the nearest convenient notary, and there make a protest setting forth the cause of said disaster as near as practicable, and the extent of the damage," such stipulation is a binding condition, upon the insured, and must be performed to entitle him to recover. *Ibid.*
3. **SAME—EXCUSE FOR NON-PERFORMANCE.**—Neither the want of knowledge of the master and crew that the vessel was insured, nor the casual remark of the agent of the insurance company, before the policy was issued, that if the owner insured he would send him, the master, word, which he failed to do, will excuse the performance of such stipulation. *Ibid.*
4. **SAME—WAIVER OF PERFORMANCE.**—The simple direction of such agent, to one of the crew, to go before an officer and make a protest, &c., is not a waiver of the legal right of the company to a legal protest in the case. *Ibid.*
5. **MUTUAL INSURANCE COMPANY—PREMIUM NOTES—CONTRACTS.**—It is competent for a Mutual Fire Insurance Company, organized under the laws of this State, to provide in its articles of associa-

tion, or by its by-laws, that all premium notes shall be paid in installments as ordered by the directors, after notice, and that if not so paid, the entire notes shall become due and collectable.—*The German Mutual Fire Insurance Co. v. Franck*, 364

JUDGMENT.

1. JUDGMENT—JURISDICTION.—The judgment of a Court having jurisdiction of the subject matter, and of the persons of the defendants, however irregular, is not void, and can not be impeached collaterally.—*Evans v. Ashley*, 15
2. PRACTICE—REFORMING JUDGMENTS.—Judgments were rendered against a sheriff and his sureties on his official bond. It was not ordered, in the judgments, that they should be executed without any relief from appraisement laws, as might have been done, according to section 1 of an act approved December 21st, 1858, and section 381 of the code, 2 G. & H. p. 220. After the lapse of one year, but within three years from the date of their recovery, proceedings were instituted in which rehearings were sought by the plaintiffs therein, for the purpose of reforming the same so far as to have them so entered as to be collectable without relief. No excuse or reason was given for the failure to have the judgments entered in accordance with said statutes; and no copy of the records in said cases were filed with the complaints. Demurrers to the complaints were sustained.
Held, 1. That the plaintiffs, so far as appeared from the complaints, by failure to take the judgments in the form they might have done, under said statutes, waived any right to judgments in forms different from those as entered.—*The State ex rel. Satterlee v. Pierce*, 116
3. STATUTES CONSTRUED—JUDGMENT OF FORECLOSURE REPLEVIBLE.—Where, in a judgment of foreclosure, the amount due is found by the Court, and the mortgaged property ordered to be sold to satisfy the same, such judgment is repleviable under section 420, 2 G. & H. p. 233, although judgment is not given for the recovery of the money.—*Niles v. Stillwagon*, 143
4. SAME—EFFECT OF RECOGNIZANCE OF BAIL—ACTION.—By section 427, *id.*, the recognizance of bail given in such case, operates as a judgment confessed, in favor of the judgment plaintiff, and against the replevin bail, for the sum of money found due by the Court; and the undertaking or recognizance of bail will support an action against such bail, for any balance due, after the property ordered to be sold is exhausted. *Ibid.*
5. RECEIVERS—LIEN OF JUDGMENT.—The lien of a judgment upon the real estate of a corporation, is not lost or affected by the subsequent appointment of a receiver to settle the business of such cor-

poration; nor is the judgment plaintiff thereby prevented from proceeding by execution, levy and sale of such property to make his debt.—*The Southern Bank of Kentucky v. The Ohio Insurance Co.*, 181

6. PRACTICE—AMOUNT OF JUDGEMENT.—Where a complaint prays judgment for the exact amount due at the first term after suit, but judgment is not then rendered, and is at a subsequent term for a sum larger than that asked for by the amount of the subsequently accrued interest only, such judgment will not be erroneous, but the complaint will be deemed to have been amended so as to demand judgment on the proper sum.—*Carpenter v. Sheldon*, 259
7. AWARD OF EXECUTION—PRACTICE—PERSONAL JUDGMENT.—Under sec. 406, 2 G. & H. 230, the Court may award execution upon an existing judgment upon constructive service of notice against the defendant, but can not render any personal judgment against them upon such notice.—*Gibson v. Green*, 422
8. PRACTICE—JUDGMENT UPON ANSWERS OF JURY TO INTERROGATORIES.—Where specific interrogatories are propounded to a jury to be answered by them unconditionally, and they seem to be so framed as to cover what appears to be the substance of the whole case, and they are fully answered by the jury, but the jury make no general verdict, the Court may well render judgment in accordance with such answers, because the course of the parties in the premises would fairly indicate an intention or consent to waive a general verdict.—*Crassen v. Swoveland*, 427

JURISDICTION.

See Costs, 1, 2.

1. STATUTES CONSTRUED—CHANGE OF VENUE.—Where a change of venue is taken from a judge of a Circuit Court, such judge is authorized by the statute, 2 G. & H. 154–5, to appoint a judge of the Court of Common Pleas to try the cause.—*Lane v. Miller*, 104
2. JUSTICES OF THE PEACE.—In actions against tenants unlawfully holding over, and in forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount.—*Sturgeon v. Hitchens*, 107
3. WAIVER.—The provision that a defendant shall not be sued out of his township is for his personal advantage, and may be waived. Jurisdiction of person, but not of the subject matter, may be conferred by consent.—*Gage v. Clark*, 163
4. CIRCUIT COURT—COMMON PLEAS—INJUNCTION.—The Court of Common Pleas has no jurisdiction to enjoin the execution of process issued out of the Circuit Court. It would seem that the stat-

ute properly construed, requires that the Circuit Court and the Court of Common Pleas shall respectively enjoin, control and litigate with reference to their own process.—*The Indiana, &c., R. R. Co. v. Williams*, 198

5. **HABEAS CORPUS—CLERK.**—The act of January 3, 1852, (2 G. & H. 304,) giving jurisdiction to the Clerk of the Circuit Courts to issue writs of *habeas corpus*, and to hear and determine them, is, by the subsequent legislation on the subject of *habeas corpus*, repealed, and such Clerks have now no such power.—*Gregg v. Wynn*, 373

JUSTICE OF THE PEACE.

1. The provisions of the statute requiring the justice to note the appointment of a special constable on his docket, and to direct the process to him by name, are imperative, and should not be construed to be directory merely. They were intended to furnish the person thus appointed with record evidence of his authority to act, without which he would have no such authority.—*Binninghoof v. Finney*, 101
2. **JURISDICTION—LANDLORD AND TENANT.**—In actions against tenants unlawfully holding over, and in forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount.—*Sturgeon v. Hitchens*, 107
3. **PRACTICE IN ATTACHMENT.**—The practice in attachment proceedings is the same in justices' as in the superior Courts.—*Dunn v. Crocker*, 324
4. **EXECUTION ON JUSTICES' JUDGMENT.**—Where a constable levies upon property to satisfy an execution from a justices' Court, and advertises it for sale, but fails to sell, and returns the writ, with his proceedings indorsed thereon, and the justice issues another execution, and fails to append to it a copy of the return made to the first, his failure so to do will not render the second execution void, but only voidable, and it might be set aside on motion before the justice, but if no such motion was made, all acts done under it will be valid.—*Culbertson v. Milhollin*, 362

LANDLORD AND TENANT.

See JURISDICTION, 2. CONSTITUTIONAL LAW, 1.

1. **LANDLORD AND TENANT—FORFEITURE OF LEASEHOLD.**—The failure of a tenant to pay rent will not work a forfeiture of his estate, unless it is so expressed in the lease or agreement.—*Brown v. Bragg*, 122
2. **SAME—STATUTES CONSTRUED.**—The words "all general tenancies," in section 2, 2 G. & H. p. 359, mean such tenancies only as are not

fixed and made certain in point of duration, by the agreement of the parties. *Ibid.*

3. SAME.—*Semble*, that the words, "or for a shorter period," in the same section, embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties, as less than a year. *Ibid.*
4. ESTATES FOR YEARS.—Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great. *Ibid.*

LEASES.

See LANDLORD AND TENANT. MORTGAGE, 8, 9, 10, 11.

1. CONTRACT—LEASE OF WATER POWER.—Where successive leases of water power on the *Wabash and Erie Canal* are executed by the trustees thereof to different persons, and the water in the canal proves insufficient to supply the requisite amount to all the lessees, but is sufficient to supply some of them, the lessees should be supplied in the order in which the leases are executed.—*The Board of Trustees, &c. v. Reinhart*, 463

LEGAL TENDER.

See THAYER v. HEDGES, 282.

LICENSE.

See APPEAL, 2.

LIEN.

1. RECEIVERS—LIEN OF JUDGMENT.—The lien of a judgment upon the real estate of a corporation is not lost or affected by the subsequent appointment of a receiver to settle the business of such corporation; nor is the judgment-plaintiff thereby prevented from proceeding by execution, levy and sale of such property to make his debt.—*The Southern Bank of Kentucky v. The Ohio Insurance Co.*, 181

LIMITATIONS.

1. LIMITATIONS—TRUSTS.—Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust, and time begins to run against a trust only from the date of its open disavowal.—*Cunningham v. McKindley*, 149

2. **SAME.**—Even unjustifiable delay and gross inattention on the part of some of the *cestui que trusts* furnish no bar to relief against persons conversant with the trust. *Ibid.*
3. **LIMITATIONS—STATUTES CONSTRUED.**—Section 220, 2 G. & H. p. 163, relates to causes of action originally arising upon promises or contracts, and not to continuing trusts, and especially those arising by operation of law. *Ibid.*
4. **LIMITATIONS.**—In an action upon a written promise to pay a specified sum of money, which is commenced more than twenty years after the maturity of the promise, the plea of the statute of limitations is a good bar, and the mere fact that payments were made and indorsed upon the written contract within twenty years prior to the commencement of the action would not remove the bar, unless a new promise, which might be inferred from the payments, were specially pleaded by way of replication; because otherwise the evidence of such payments would not be admissible under the issues.—*Conkey v. Barbour*, 196

MARSHALING SECURITIES.

1. **EXECUTION—INJUNCTION.**—*A* recovered a judgment against two persons. The property of one has passed by purchase, under a junior lien, to another person, and the property of the other to another person by purchase. *A* seeks to enforce payment of the judgment by levy and sale of the property of the former, who seeks to enjoin the sale thereof until the property of the latter shall have been exhausted.
Held, that such sale ought not to be enjoined, because the principle of equity, authorizing the marshaling of securities in certain cases, does not apply in such a case.—*Sanders v. Cook*, 436

MORTGAGE.

See ACTION, 15.

1. **MORTGAGE—INSTRUCTIONS TO JURY.**—*A* and *B*, being the owners of a certain tract of land, subscribed the same to the *D* railroad company. The railroad company subsequently conveyed the land to *E* and *F*, who afterwards conveyed the same, with other lands, by deed in fee, absolute on its face, to *G*, who died, leaving the plaintiffs his heirs at law. A witness testified that *E* and *F* had contracted to build the road, and in "order to enable them to raise money and go on with the work, *G* had indorsed largely for them, and the lands were conveyed to him to indemnify him as such indorser." Upon the evidence thus adduced the Court charged as follows: "The defendants insist that the conveyance by *E* and *F* to *G*, the ancestor of the plaintiffs, was intended only as a mortgage security, and was for that purpose made, and although abso-

lute on its face, the defendants have a right to show that it was intended only as a mortgage. And if it was given by *E* and *F* to *G* to secure him against loss, on account of his security for them, it would only amount to a mortgage, and if only a mortgage, the plaintiffs can not recover unless they were purchasers without notice."

- *Held*, that the instruction thus given was pertinent to the issue, consistent with the proofs, and therefore properly given.—*Smith v. Parks*, ✓ 59

2. FRAUDULENT INTENT.—Whether a mortgage is given with a fraudulent intent is, under the statute, § 21, 1 G. & H. p. 353, a question of fact for the jury to determine.—*Maple v. Burnside*, 139

3. MORTGAGE—WIDOW'S ESTATE IN LANDS OF HUSBAND.—Prior to May 6, 1853, *A* executed a mortgage upon certain real estate of *B*, his wife not joining, to secure the payment of certain sums of money then due from *A* to *B*, and of all sums which might thereafter become due. *A* died in 1858, leaving a widow. One-third of the mortgaged land was afterwards set off to the widow. *B* then foreclosed his mortgage and had a decree for the sale of the other two-thirds to pay the indebtedness which existed at the date of the mortgage, and which accrued after May 6, 1853, and it was sold and the proceeds were only sufficient to pay that part of the debt which existed at the date of the mortgage. *B* claims a right to subject the widow's third to the payment of the subsequent indebtedness, on the ground that her dower estate in the land was abolished by the legislature, and her contingent fee therein never attached by reason of the mortgage.

Held, that, under the circumstances, *B* had no claim under the mortgage upon the third set off to the widow.—*Morton v. Noble*, 160

4. CONTRACT—TRUST DEED—MORTGAGE.—A deed of trust, executed by a railroad company to a trustee, to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, in the granting clause of which the following words are used, "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter acquire, with the superstructure, rails, and other materials used thereon," must be construed to embrace wood provided for the use of the road from time to time.—*Coe v. McBrown*, 252

5. But such deed of trust is, in legal effect, only a mortgage, and the company have a right to redeem, and that right is a leviable interest, which may be sold on execution. *Ibid*.

6. MORTGAGES—FORECLOSURE BY STATE—STATUTES CONSTRUED.—The summary foreclosure of school fund mortgages, which were executed to the State prior to 1852, and the sale of the mortgaged

property, should be conducted according to the law in force at the time the contract was made.—*Hopkins v. Jones*, 310 ✓

7. **MORTGAGE—WHAT CONSTITUTES.**—Where *A* borrows of *B* a sum of money and gives his note therefor, and at the same time executes a deed conveying certain real estate to *B*, reciting in the deed a consideration just equal to the note, and, at the same time *B* executes a bond to *A*, conditioned that, upon the payment by *A* of said note, he would reconvey said real estate to him, the facts, taken together, constitutes *prima facie* a mortgage of the real estate by *A* to *B*.—*Crassen v. Suoveland*, 427

8. **LEASE—CHattel MORTGAGE—ESTOPPEL.**—*A* and *B* executed a lease to *C*, of certain land for seven years, at an agreed rent, upon which *C* agreed to erect certain buildings and to carry on certain business, which buildings *C* should own and be entitled to remove at the end of the term, and, to secure the payment of the rent, said buildings were declared in the lease to be mortgaged to *A* and *B*. The latter signed and acknowledged said lease, on *May* 29, 1857, and *C* did so on *July* 9, 1857, at which time said buildings had been erected on said premises and on *July* 10, 1857, it was recorded in the mortgage record of the county. *D* was subscribing witness to the execution of the lease by *C*, and, by an arrangement subsequently made between him and *C*, he became the prospective owner of the improvements to be credited by *C* on the land.

Held, 1. That *D* was estopped by his own acts to deny the ownership of said lease and improvements by *C*, or his right to incumber them by liens; and all persons claiming under, or through *D*, were bound by that estoppel, as to liens created as above, unless they can show fraud or want of consideration.—*Blakemore v. Taber's Ex'r*, 466

9. *Held*, 2. That *A* and *B* to the extent to which they had the first lien on said improvements, under the terms of said lease, could enforce it by foreclosure, against *D*, and those claiming under or through him, said lease, as to said lien, being equivalent to a mortgage. *Ibid*.

10. *Held*, 3. That said lease in its character of mortgage, was not void for uncertainty, the property mortgaged being on the premises of the mortgagees, and to that extent in their possession and identified, and said mortgage being recorded. *Ibid*.

11. *Held*, 4. That foreclosure is the proper remedy for the enforcement of a chattel mortgage. *Ibid*.

MUNICIPAL CORPORATIONS.

See THE BOARD OF COMMISSIONERS OF ALLEN CO. v. SILVERS, 491

1. **CITY—POWER TO SUBSCRIBE STOCK, AND ISSUE BONDS TO A RAILROAD COMPANY.**—A municipal corporation can not, without special

authority, subscribe stock and issue bonds in payment of it, in a railroad corporation. But such authority may be conferred upon a city, when it is expedient; and when it is given, by statute, in any case, it must be executed as prescribed in the grant, if executed at all. The terms of the grant can not be legally departed from or exceeded.—*The City of Aurora v. West*, 88

2. **SAME—BONDS—NOTICE OF POWER.**—When bonds, issued by a municipal corporation, bear a reference upon their face to the authority under which they are issued, all persons are bound to take notice of the extent of the powers of the agent who issued them. *Ibid.*

NEW TRIALS.

1. **NEW TRIAL—DIVORCE.**—*A* sued for and obtained a divorce from his wife, *B*, for reasons alleged, and held by the Court to be sufficient, and asked that certain property might be set off to her, which the Court consented to and did order. Afterwards, at the same term at which the divorce was granted, and the order made, he moved the Court for a new trial, for other reasons of which he was not cognizant when the decree and order was made, and which would have enabled him, if known and disclosed, to have obtained the divorce without letting her have the property.

Held, that, under the circumstances of the case, the motion for a new trial was correctly overruled.—*Rindge v. Rindge*, 21

2. **LANDLORD AND TENANT.**—Action for the unlawful detention of real estate, trial by jury, and verdict for the plaintiff for 51 dollars damages. The cause was tried a second time by the Court, and the defendants had judgment. In the meantime the defendants surrendered the possession to the plaintiff. A third trial was afterwards had in the absence of the defendants and their counsel; and 500 dollars was recovered against them. After the close of the term, the defendants filed a complaint for a new trial, sworn to, in which it was shown that the trial of the cause was had in their absence, and in the absence of their attorney, who had gone to the war; that they did not discover, until after the close of the term, that the cause had been tried in the absence of their attorney; that they had a meritorious defence; that reasonable ground existed for belief on their part that their cause would be well attended to without their personal presence, and that they were excusable in being absent.

Held, that under the circumstances of the case, the new trial should have been granted.—*Sturgeon v. Hitchens*, 107

3. **MISCONDUCT OF JUROR.**—The misconduct of a juror, in order to be sufficient to justify the granting of a new trial, must be gross, and must have resulted in manifest injury to the complaining party.

The mere fact that a juror, pending a trial, and whilst the jury were separated for dinner, expressed the opinion that the jury would find for the plaintiff, without other improper conduct, would not be sufficient ground for a new trial.—*Harrison v. Price*, 165

1. PLEADING.—Where a new trial is prayed for, on the ground of causes discovered after the term at which the verdict or judgment was rendered, the complaint should clearly show that such causes were discovered after such term, or it will be bad on demurrer.—*Tillson v. Crim*, 357
5. PLEADING.—Where an application for a new trial is made after the term, based upon newly discovered evidence, there must be brought to the knowledge of the Court, by affidavits or otherwise, the issues in the cause, the evidence adduced upon the former trial, and the newly discovered evidence, in order that the Court may correctly determine its duty in the premises.—*Pattison v. Wilson*, 357
6. PLEADING.—The rule that, where a new trial is applied for after the term, on account of newly discovered evidence, the evidence given on the trial had must be substantially set forth, does not apply necessarily where the new trial is applied for on other grounds.—*House v. Wright*, 383
7. NUMBER OF NEW TRIALS.—In civil causes, only two new trials can be granted to the same party in the cause, upon any grounds whatever.—*Roberts v. Robeson*, 456

NOTICE.

1. VENDORS AND PURCHASERS—CONTINUED POSSESSION.—Possession of real estate is only constructive notice to all the world of the rights of the party in possession; but it is held that the continued possession by the grantor of land after the making of his deed, will not be notice of a defeasance held by him which is not recorded.—*Crassen v. Swoveland*, 427

OFFICER—DUTY OF.

See COUNTY TREASURER, 1, 2, 3. COMMISSIONERS, 1, 2.

OFFICIAL BONDS—EXECUTION OF.

See BONDS, 7, 8, 9, 10. COMMISSIONERS, 1, 2.

OVERRULED CASES.

1. The cases of *Thomasson v. The State*, 15 Ind. 449; *Sohn v. The State*, 18 Ind. 389, and *The State v. Thomasson*, 19 Ind. 99, are overruled, so far as the decisions therein are inconsistent with the decisions in *Hingle v. The State*, and *Lauer v. The State*, *infra*.—*Hingle v. The State*, 462

PARTITION.

1. PARTY NOT SERVED.—A tenant in common, not a party to proceedings in partition on the part of his co-tenants, is not effected thereby in any manner.—*Harlan v. Stout*, 488
2. PURCHASER OF COMMISSIONER.—The fact that one of the parties in interest was not a party to proceedings in partition in which the land was ordered to be sold by a commissioner, would be sufficient of itself, on the application of the *bona fide* purchaser at such commissioner's sale, to set the same aside. *Ibid.*
3. PARTITION—NON-CONFIRMATION OF SALE.—As to facts which would make it the duty of the Court, on the application of the owners, or part of them, to set aside a sale of land made by a commissioner in partition, see the opinion at length. *Ibid.*

PLEADING.

See PRACTICE, 5. THE INDIANAPOLIS, & C. R. R. Co. v. WRIGHT, 376.
CONTRACTS, 17, 18, 19. RAILROADS, 21.

1. PLEADING—REPLEVIN BOND.—To an action by the obligee, on a replevin bond, where the title to the property in question was not decided in the replevin suit, a plea in bar by the obligor, as to all except nominal damages, of title in himself, is good.—*Stockwell v. Byrne*, 6
2. SAME—BREACH OF WARRANTY.—A purchaser of property may set up fraud, or breach of warranty, as a defence to an action against him for the purchase money, and if the injury sustained is equal or greater than the amount of the purchase money, unpaid, he may defeat the action entirely; if the injury is less it will go in reduction of the plaintiff's claim.—*Love v. Oldham*, 51
3. FRAUD—BREACH OF WARRANTY—COUNTER CLAIM.—Under the code a defendant may set up fraud or breach of warranty, by way of counter claim, and not only defeat the action, but recover against the plaintiff any damage greater than the plaintiff's claim. *Ibid.*
4. PLEADING.—It is a sufficient allegation of marriage, in a complaint for criminal conversation with the plaintiff's wife, that, at the time she was debauched, she was his wife.—*Hauck v. Grantham*, 53
5. PLEADING—ESTOPPEL.—Suit by *A* against the *T* railroad company for the assessment of damages, on account of the taking by the company for the use of her road, of a lot in *B*, belonging to *A*. The sixth paragraph of the answer alleged that in the year 1852, one *C* being in possession of the lot, and claiming the ownership thereof, with the full knowledge of *A*, died, leaving a widow and minor heirs; that one *D* was appointed by the proper Court guar-

dian of said heirs, who filed his petition in the *E* Court of Common Pleas, for the sale of the interest of said heirs in the lot in question, procured an order of sale, sold the lot to the defendant at its full appraised value, reported the sale to the Court, which was approved; that the defendant paid the purchase money in full; that a deed was ordered, executed and approved by the Court; that *D* afterwards made a final settlement of his said trust, and obtained a discharge therefrom; that afterwards *A*, who was the grandfather of said minor children, having knowledge of the facts, and for the purpose of procuring the full proceeds of said sale for said children, made a voluntary application for their guardianship, and on the day of his appointment brought suit, as such guardian, against *D*, on his bond, setting out the sale and the receipt by *D* of the purchase money, alleging the failure to pay over the full amount so received, and asking a judgment for 1,500 dollars, which the company insisted was an affirmation of the judicial sale, and estopped *A* from maintaining his suit.

Held, that the said paragraph was not good as a plea in estoppel, because it did not show that the *T* railroad company purchased the lot, or paid the consideration therefor, on the faith of some act or statement of *A*, or of his silence under circumstances that required him to speak and disclose his title, nor any act of said *A* subsequent to such purchase, which amounted to a ratification of the sale made by *D*.—*The Terre Haute, Alton, &c., R. R. Co. v. Norman*, 63

6. PLEADING—COMPLAINT—WRITTEN INSTRUMENT.—Where a pleading is founded on a written instrument, the original or a copy must be filed with it; and if the original or a copy is not so filed, the defect may be reached by a demurrer.—*The Peoria Marine, &c., Co. v. Walser*, 73
7. SAME.—In order that a Court may know that a written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading. *Ibid.*
8. FAILURE TO DENY.—A failure to deny, under oath, the execution of an instrument that does not show an apparent execution on its face, is not an admission of its execution. *Ibid.*
9. ON JUDGMENT OF JUSTICE.—A complaint to enjoin the collection of a judgment rendered by a justice of the peace should show that the judgment was rendered without the defendant's consent, where the alleged error consists in the residence of the defendant in another township, and should contain a transcript of the proceedings before the justice, or at least a full statement of them.—*Gage v. Clark*, 163

10. WANT OR FAILURE OF CONSIDERATION.—Want of consideration and failure of consideration are not identical in their nature, and may be separately pleaded in answer to the same action.—*McClintic's Adm. v. Cory*, 170
11. PLEADING.—An answer setting up a matter by way of counter-claim as a bar to the whole cause of action which is sufficient only to bar a part of it, is bad. *Ibid.*
12. CONTRACT—PAROL EVIDENCE TO VARY.—Where a note is executed by *A* to *B*, which is absolute and unconditional upon its face, and it is agreed between them at the time, by parol, that the note shall not be paid unless a certain other note, then transferred by *B* to *A*, could be set off by *A* against *C*, the payor of the latter, whom *A* owed at the time, and *A* failed to secure the set off against *C*, and *B* sue *A* on his note, such parol contract can not be pleaded to show a failure of the consideration of the note of *A*, and such contemporaneous parol agreement would not be admissible in evidence to contradict or vary the terms of the note.—*McClintic's Adm'r. v. Cory*, 170
13. ACTION FOR CRIMINAL CONVERSATION.—In such an action it is not competent for the defendant to plead in bar a want of virtue in the plaintiff and his wife, and it does not need to be pleaded at all in order to authorize evidence of the fact to be produced in mitigation of damages.—*Harrison v. Price*, 165
14. SLANDER.—In complaints for slander, the words spoken should not be alleged with a *continuando*. Slanderous words spoken at one time, constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action, but if relied upon, they should be separately pleaded in separate paragraphs.—*Swinney v. Nave*, 178
15. SAME.—It is unnecessary, but admissible, under the code, to answer in mitigation in actions of slander. Matter in mitigation may be given in evidence under an answer in justification. *Ibid.*
16. SET OFF.—As to the requisites of an answer by way of set off, under section 58, 2 G. & H. 89, see the opinion herein.—*Durbon v. Kelley's Adm'r.*, 183
17. SLANDER.—To say of a physician that, "in my opinion the bit-
ters that *A* fixed for *B* were the cause of his death," is not action-
able *per se*, and such words do not, in their usual sense, import a
charge of murder.—*Jones v. Diver*, 184
18. SAME.—But the words, pleaded with a proper colloquium, "that
the bitters that *Dr. Diver* gave to *John Smith* caused his death;
there was poison enough in them to kill ten men," are action-
able *per se*, because they imply a charge of gross misconduct and

complete unfitness of the physician to be employed in his profession. Where words spoken of a professional man only impute ignorance or want of skill in a particular case, they are actionable only where they cause special damage. *Ibid.*

19. BY-LAW OR ORDINANCE.—In an action to recover the penalty for the violation of a by-law or ordinance of a city, a copy of the by-law or ordinance should be made a part of the complaint and filed with it.—*Green v. The City of Indianapolis*, 192
20. REPRESENTATIONS.—An answer to an action upon a note is sufficient, which alleges that the note was given in payment for the last installment on a stock of goods purchased of the plaintiff, which was represented to him at the date of purchase to be worth 3,500 dollars, and that it would invoice that amount or more; that the defendants were ignorant of the amount and value of the stock, and requested an invoice before purchasing; but the plaintiff said he had no time to make it, but assured them that he knew the goods would amount to more than 3,500 dollars; that the defendants purchased on this representation; but that it was false, and known to be so by the plaintiff when he made it; and that the goods, in fact, invoiced and amounted to but 1,500 dollars.—*Davis v. Jackson*, 233
21. PLEADING.—An answer, which states facts constituting a bar to a part only of a cause of action, is bad on demurrer, if it be pleaded in bar of the whole cause.—*Richardson v. Hickman*, 244
22. PLEADING—JUDGMENT OF JUSTICE.—A complaint or answer, based upon the transcript of a judgment of a justice of the peace of another State, should aver "that the judgment or decision was duly given or made," or equivalent facts. This is necessary where the judgments are against garnishees in attachment as well as in ordinary cases. *Ibid.*
23. REPRESENTATIONS.—A complaint is good on demurrer which alleges that the plaintiff purchased of the defendant twenty-seven head of hogs for a price equal to the full value of sound hogs; that the defendant represented them to be sound and healthy; that the plaintiff relied upon said representations, having no opportunity by reasonable diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then affected with hog cholera, and known to be so by the defendant, and that afterwards twenty-five of them died of that disease, &c.—*Baker v. McGinniss*, 257
24. STOCK KILLED.—A complaint against a railroad company for stock killed on the road where it was not fenced, will sufficiently aver the want of fence if it allege "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner

- and form as in the statute provided," and under such averment, proof may be made that the road had not been duly fenced in at all, or, if it had that the fence had not been properly maintained.—*The Toledo, &c., R. R. Co. v. Fowler*, 316
25. ATTACHMENT—REPLEVIN—AFFIDAVIT.—In either of these forms of action, the affidavit may contain the requisites, both of a complaint and affidavit, so as to dispense with any separate complaint.—*Drum v. Crocker*, 324
26. COMPLAINT ON ATTACHMENT BOND.—In an action upon an undertaking in attachment, it is necessary to set out the undertaking and show that a case arose in which it was properly taken, but the proceedings in attachment need not be fully set out or made part of the complaint. They are not the foundation of the action. *Ibid.*
27. SET OFF.—Where the maker of a note, in an action upon it by an assignee against him, pleads, that, at the time of the indorsement of the note by the payee to the plaintiff, the payee was indebted to him, &c., such averment will sufficiently show that the indebtedness accrued before notice of the assignment of the note.—*Jenkinson v. Boen*, 344
28. DEMURRER.—A demurrer to three paragraphs of an answer in these words: "Said plaintiff comes and demurs to the first, second and third paragraphs of the defendant's answer, and each of them, for the following grounds of exception, viz: that said paragraphs of defendant's answer do not state facts sufficient to constitute a defence," should be treated as joint, and not several, and if any one of the answers so demurred to was good, the demurrer should be overruled.—*Barner v. Morehead*, 354
29. NO CONSIDERATION.—An answer to an action upon a note, that the note was given without any consideration whatever is good. *Ibid.*
30. NEW TRIAL.—Where a new trial is prayed for, on the ground of causes discovered after the term at which the verdict or judgment was rendered, the complaint should clearly show that such causes were discovered after such term, or it will be bad on demurrer.—*Tilson v. Crim*, 357
31. NEW TRIAL.—Where an application for a new trial is made after the term, based upon newly discovered evidence, there must be brought to the knowledge of the Court, by affidavits or otherwise, the issues in the cause, the evidence adduced upon the former trial, and the newly discovered evidence, in order that the Court may correctly determine its duty in the premises.—*Pattison v. Wilson*, 358
32. HABEAS CORPUS—PETITION FOR.—Where a guardian desires, by the aid of a writ of *habeas corpus*, to obtain the custody of his ward,

he must make his letters of guardianship a part of his petition for the writ.—*Gregg v. Wynn*, 373

33. NEW TRIALS.—The rule that, where a new trial is applied for after the term, on account of newly discovered evidence, the evidence given on the trial had must be substantially set forth, does not apply necessarily where the new trial is applied for on other grounds.—*House v. Wright*, 383
34. RELATOR—AUDITOR OF STATE.—In actions to recover money due the State from a county treasurer and his sureties, the Auditor and not the Treasurer of State should be the relator.—*Pepper v. The State, &c.*, 399
35. FRAUDULENT SALE.—A mortgagee, where the mortgaged property has been sold at sheriff's sale, upon a judgment fraudulently procured in favor of another person, may institute his action to set aside the sheriff's sale, without, at the same time, suing for the foreclosure of his mortgage, and his mortgage, or a copy of it, need not, in such case, be filed with the complaint.—*Potter v. Sumner*, 442
36. SET OFF.—A claim arising out of tort can not be set off against a demand arising out of contract.—*The Indianapolis, &c., R. R. Co. v. Ballard*, 448

POOR.

1. PAUPERS—COUNTY POOR.—It is not the intention of the poor laws of this State to require that all persons needing temporary relief shall be removed to the county asylum before receiving it.—*The Board, &c., of Bartholomew Co. v. Wright*, 187
2. SAME—STATUTES CONSTRUED.—It is the obvious general purpose of the poor laws of this State to make the mode of giving relief to paupers a county system and not a township system, and to make the township trustees subordinate to the county commissioners.
Ibid.

PRACTICE.

See WITNESS, 1. THE INDIANAPOLIS, &c., R. R. Co. v. WRIGHT, 376.
RAILROADS, 21. THE BOARD OF COM., &c. v. SILVERS, 491.

1. PRACTICE—REPLEVIN—TITLE.—Where, in an action of replevin, the writ is quashed for a defect in the affidavit, and thereupon the cause is dismissed by the plaintiff, the question of title to the property in dispute is not settled.—*Stockwell v. Byrne*, 6
2. INSTRUCTIONS TO JURY. A party has no right to complain of an instruction given the jury, which works no injury. *Hamilton v. Matlock*, 47

3. **SPECIAL FINDING.**—A special finding must be in writing, so that an exception may be taken; and it must be filed with the clerk, so that he can enter it, and the exception to it, of record. And as evidence of its genuineness to an appellate Court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him.—*The Peora Marine, &c., Co. v. Walser*, 73
4. **PRACTICE—REFORMING JUDGMENTS.**—Judgments were rendered against a sheriff and his sureties on his official bond. It was not ordered, in the judgments, that they should be executed without any relief from appraisement laws, as might have been done, according to section 1 of an act approved December 21st, 1858, and section 381 of the code, 2 G. & H. p. 220. After the lapse of one year, but within three years from the date of their recovery, proceedings were instituted in which rehearings were sought by the plaintiffs therein, for the purpose of reforming the same so far as to have them so entered as to be collectable without relief. No excuse or reason was given for the failure to have the judgments rendered in accordance with said statutes; and no copy of the records in said cases were filed with the complaints. Demurrers to the complaints were sustained.
Held, 1. That the plaintiffs, so far as appeared from the complaints, by failure to take the judgments in the form they might have done, under said statutes, waived any right to judgments in forms different from those as entered.—*The State ex rel. Satterlee v. Pierce*, 116
5. *Held* 2. That in a suit upon a judgment a transcript thereof must be filed with the complaint. *Ibid.*
6. **ATTACHMENT—PRACTICE.**—Where an issue is formed on an affidavit for attachment, it should be tried by the Court, or jury, with the issues in the cause in which the attachment is issued.—*Muple v. Burnside*, 139
7. **SAME.**—But if the issue in the cause is first tried, and there is no objection interposed by the defendant, to the subsequent trial of the issue on the affidavit for attachment, he will be deemed to have waived the right which he had to insist upon a trial of the whole controversy at once. *Ibid.*
8. **PROCEEDINGS SUPPLEMENTARY TO EXECUTION—LIEN—PRACTICE—JURISDICTION.**—Creditors who regularly institute these proceedings, acquire a lien upon the claim intended to be reached, from the time of the service of process on the defendant, and the subsequent assignment of the claim does not divest that lien; nor is it divested by a subsequent amendment of the original affidavit.—*Cooke v. Ross*, 157
9. It is doubtful whether section 522, 2 G. & H. 261, contemplates the formation of issues as in ordinary cases. *Ibid.*

10. *Seemle*, that where these proceedings are instituted against *A*, a judgment debtor, and *B*, (who is indebted to *A*,) for the purpose of reaching such indebtedness, the question as to the liability of *B* can not properly be raised by *A* in his pleadings. *Ibid.*
11. But, at least, it is competent for the plaintiff to waive the answer of the debtor, and, having done so, it is competent for the Court to refuse the debtor leave to file an answer and make new parties, &c. *Ibid.*
12. These proceedings may be instituted in a Court different from that in which the original judgment was rendered and out of which the execution was issued. *Ibid.*
13. FILING BILLS OF EXCEPTIONS.—Where special leave of the Court is given to file bills of exceptions on or before the first day of the next term, and such bills are not filed within that time, but are filed thereafter during the next term, without any further leave of the Court as shown by its record, such bills will not be considered as any part of the record in this Court. This Court will not presume that further time was given, even if the Court below had power to grant it.—*Harrison v. Price*, 165
14. BILLS OF EXCEPTIONS.—A bill of exceptions can not be filed by the judge, after the time given by the Court in term; at least without the consent of all the parties.—*Swinney v. Nave*, 178
15. SAME.—A motion to strike out a part of a pleading need not be in writing unless required by a rule of the Court in which it is made, and error in overruling such motion should be taken advantage of by bill of exceptions. *Ibid.*
16. DEPOSITIONS.—Where the certificate to a deposition states that the deponent "was sworn to testify the whole truth of his knowledge touching the matters in controversy in the cause," it should be held to be an immaterial deviation from the exact requirements of the statute in such cases.—*Welborn v. Swain*, 194
17. QUESTIONS TO JURY.—Where the parties to a case, by agreement on the trial, refer to the jury certain questions covering the points they desire to have settled, it will not be admissible for either party to introduce evidence upon the trial not pertinent to the issues so presented.—*Sidener v. Essex*, 201
18. HIGHWAYS.—An order for the location and opening of a highway, should specify the width thereof; but where such a defect exists in an order, and does not conflict with the rights of an appellant to this Court, it will not be made the ground of a reversal, but the cause will be remanded to the lower Court for the correction of its order in that respect. *Ibid.*

19. **VARIANCES.**—In actions upon notes and mortgages, any variances between the averments in the complaint and the causes of action filed with it, may be amended on motion, and will be deemed corrected in this Court.—*Ebersole v. Redding*, 232
20. **CONTINUANCE.**—An application for continuance, to obtain absent testimony, should show the exercise of reasonable diligence to obtain it before.—*Mugg v. Graves*, 236
21. **OBJECTIONS TO EVIDENCE.**—The grounds of objections to evidence should be fully stated to the Court below in order to make them available in this Court. *Ibid.*
22. **ERRORS WAIVED.**—Error in the progress of a trial, which is not made the basis of a motion for a new trial, is waived, and section 347 of the code, 2 G. & H. p. 210, does not dispense with the necessity for the motion for a new trial on the ground of the supposed error.—*Garver v. Daubenspeck*, 238
23. **SURPRISE.**—Mere surprise at the result of a trial can not entitle the party so surprised to a new trial.—*Lane v. Brown*, 239
24. **LEAVE TO RETAKE DEPOSITIONS.**—It is competent for the Court, on oral or written motion, to allow a party to re-examine witnesses, whose depositions have already been taken and filed in the cause, and are unpublished and unsuppressed; but such examination can not be made without leave of the Court.—*Addleman v. Swartz*, 249
25. **EXCEPTIONS TO INSTRUCTIONS.**—Exceptions to instructions given or refused by the Court should be specific, in order to make any error committed by the Court in connection with them available.—*Baker v. McGinniss*, 257
26. **VARIANCE.**—Where it is averred in the complaint that the note sued on was indorsed to the plaintiff by *Caleb Hendee*, and the note offered in evidence on the trial is indorsed by *C. Hendee*, the variance will not be material and the indorsement on the note will be admissible in evidence.—*Carpenter v. Sheldon*, 259
27. **AMOUNT OF JUDGMENT.**—Where a complaint prays judgment for the exact amount due at the first term after suit, but judgment is not then rendered, and is at a subsequent term for a sum larger than that asked for by the amount of the subsequently accrued interest only, such judgment will not be erroneous, but the complaint will be deemed to have been amended so as to demand judgment on the proper sum. *Ibid.*
28. **INJUNCTION—ILLEGAL TAX.**—If illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction.—*The Toledo, &c., R. R. Co. v. The City of Lafayette*, 262

29. **BILL OF EXCEPTIONS.**—A bill of exceptions filed after the term at which the proceedings excepted to were had, without leave of the Court, can not be considered as a part of the record on appeal. Errors of law, to be available, must be excepted to at the time, but exceptions can not be shown by a bill of exceptions filed after the term at which the alleged errors were committed, unless leave be given.—*Garroll v. Young*, 270
30. **APPEAL.**—Where no appeal was prayed, and no bond given in the Court below, a cause can not be properly appealed as from an interlocutory order, under the second specification of section 576, 2 G. & H. 276.—*Berry v. Berry*, 275
31. **ATTACHMENT—WAIVER.**—Where the defendant appears in attachment suits the regularity of the attachment proceedings must be tried in such suits; and if the defendant, having appeared, makes no objection by motion or answer, their regularity will be deemed admitted, and all objections waived.—*Dunn v. Crocker*, 324
32. **ATTACHMENT—PRACTICE.**—Objections to the regularity of attachment proceedings can not be first raised in collateral suits. *Ibid.*
33. **AMENDMENT.**—In an action to recover personal property and damages for the detention thereof, it is not competent for the Court, in the progress of the trial, over the objection of the defendant, to permit the plaintiff to amend his complaint so as to claim special damages for expenses incurred in money and time in seeking to recover such property.—*Harris v. Mercer*, 329
34. **BILL OF EXCEPTIONS—AFFIDAVIT.**—An affidavit for a continuance is no part of the record, unless made so by a bill of exceptions, or an order of the Court under section 559 of the code.—*Harmon v. The State*, 331
35. **NEW TRIALS—APPEAL.**—An appeal can not be taken from an order of the Circuit Court granting a new trial upon application made after the term, because such an order is merely interlocutory and not final.—*House v. Wright*, 383
36. **AWARD OF EXECUTION—PRACTICE—PERSONAL JUDGMENT.**—Under sec. 406, 2 G. & H. 230, the Court may award execution upon an existing judgment upon constructive service of notice against the defendant, but can not render any personal judgment against them upon such notice.—*Gibson v. Green*, 422
37. **AMENDMENT.**—An amendment of a complaint by leave of the Court, pending a trial, if the amendment added nothing to the material averments of the complaint, could not be a fatal error, nor, in such case, could the failure to re-swear the jury after such amendment.—*Crassen v. Swoveland*, 427

38. JUDGMENT UPON ANSWERS OF JURY TO INTERROGATORIES.—Where specific interrogatories are propounded to a jury to be answered by them unconditionally, and they seem to be so framed as to cover what appears to be the substance of the whole case, and they are fully answered by the jury, but the jury make no general verdict, the Court may well render judgment in accordance with such answers, because the course of the parties in the premises would fairly indicate an intention or consent to waive a general verdict. *Ibid.*
39. VOLUNTARY ASSIGNMENT—CLAIMS AGAINST ASSIGNEE.—The proceedings for the collection of claims against the estates of decedents, and of claims against the estates of voluntary assignors are so similar, that, wherever the rules touching the former are applicable, they should govern in relation to the latter, and the formation of issues on such claims, either of law or fact.—*Gifford v. Black*, 444
40. EXCEPTIONS REQUIRING BILL OF EXCEPTIONS.—Where exceptions are taken, during a trial, which must be gotten upon the record by bill of exceptions, such bill must be filed during the term, unless leave be given to file it afterwards, and then it must be filed within the time given, or, if afterwards, by the consent of the adverse party.—*Furnsworth v. Coquillard's Adm'r*, 453
41. EXCEPTIONS AVAILABLE WITHOUT BILL OF EXCEPTIONS.—The reader is referred to the opinion at length, for a statement of some exceptions which will be available if properly noted on the record, without bill of exceptions. *Ibid.*
42. NUMBER OF NEW TRIALS.—In civil causes, only two new trials can be granted to the same party in the cause, upon any grounds whatever.—*Roberts v. Robeson*, 456
43. ISSUES TRIED TOGETHER.—It is not error to refuse a motion, or prayer of a party, to have a part of the issues in a cause tried at one time, by a jury, and the others, at another time, by the Court.—*The Cincinnati, &c., R. R. Co. v. McFarland*, 459
44. DIFFERENCE BETWEEN JOURNAL AND BILL OF EXCEPTIONS.—Where there is a difference between the journal entry of the clerk, and the recitals in the bill of exceptions, the latter must control. *Ibid.*
45. MODE OF EXAMINING WITNESS.—Where a witness is allowed by the Court to read his testimony in chief to the jury, from a previously written narrative, without interrogations, over the objection of the adverse party, and the witness is then subjected to a full cross-examination by the adverse party, and re-examination by the party producing him, in the usual manner, this Court will not reverse the judgment below on account thereof, unless it appear that

the complaining party was injured thereby, but, the evidence not being in the record, will presume in favor of the lower tribunal.—*Mansur v. Bradley*, 476

46. PRACTICE IN SUPREME COURT.—As to points of practice in this Court, see the latter part of this opinion. *Ibid.*

PRACTICE IN SUPREME COURT.

1. PRACTICE IN SUPREME COURT.—The finding of the Court below will not be disturbed, by this Court, where the evidence, though circumstantial, tends to sustain it.—*Crisman v. Smith*, 13
2. SAME.—Where evidence is not objected to in the Court below, it is too late to make the objection in this Court. *Ibid.*
3. DEPOSITIONS.—An alleged error, by the Court below, in suppressing a deposition, where no exception is taken, and the deposition is not set out in the record, is not available here.—*Hauck v. Grautham*, 53
4. CERTIORARI.—A *certiorari* where the alleged defect does not appear upon the face of the record, and the application alleging it is not verified, will not be granted; nor, as a general rule, after a cause has been decided.—*The Peoria Marine, &c., Co. v. Walser*, 73
5. ERROR IN EXAMINING WITNESS.—A cause will not be reversed, in this Court, for the error of permitting a question to be put and answered, where the answer is harmless; nor where, though not harmless, no motion for a new trial, on account of the error, was interposed.—*The City of Aurora v. West*, 88
6. WHAT ERRORS CONSIDERED.—Errors assigned in this Court, and simply copied into the brief of the party making the assignment, without argument or authority in support of them, will not be considered by this Court.—*Bennett v. The State, &c.*, 147
7. FILING BILLS OF EXCEPTIONS.—Where special leave of the Court is given to file bills of exceptions on or before the first day of the next term, and such bills are not filed within that time, but are filed thereafter during the next term, without any further leave of the Court, as shown by its record, such bills will not be considered as any part of the record in this Court. This Court will not presume that further time was given, even if the Court below had power to grant it.—*Harrison v. Price*, 168
8. OBJECTIONS TO FORM OF JUDGMENT.—Objections to the terms of the judgment below can not be first raised in this Court.—*Ebersole v. Redding*, 232

9. **OBJECTIONS TO EVIDENCE.**—The grounds of objections to evidence should be fully stated to the Court below in order to make them available in this Court.—*Mugg v. Graves*, 236
10. **REVERSAL OF EVIDENCE.**—Where there is some evidence to sustain the verdict of a jury, although the preponderance may appear to be against it, this Court will not reverse the judgment rendered upon it.—*Lane v. Brown*, 239
11. **BILL OF EXCEPTIONS.**—Where a bill of exceptions does not contain a copy of the matter excepted to, or a direction to insert it, it will be defective; but if the bill, as filed here, contain the matter excepted to, this Court will presume that it was written out in the bill as originally filed in the Court below, or that the bill contained the proper direction to insert it, and if the bill, as originally filed, contained the proper direction to insert it, it would probable be sufficient for the clerk, in making up the record for this Court, to refer to it as copied into another part of the transcript.—*Harmon v. The State*, 331
12. **ERROR IN GIVING NEW TRIALS.**—The Supreme Court will much more reluctantly reverse the final judgment of a cause for error in granting than for error in refusing a new trial.—*House v. Wright*, 383
13. **PERSONAL JUDGMENT.**—Where a personal judgment is rendered upon default or constructive notice, and no steps are taken below to vacate it before an appeal to this Court, the appeal will be dismissed.—*Gibson v. Green*, 422

PRESUMPTIONS.

1. **SHERIFF'S SALES—APPRAISEMENT.**—In the absence of proof whether property sold by a sheriff was sold with or without appraisement, it will be presumed that the sheriff, in that respect, performed his duty.—*Evans v. Ashby*, 15
2. **CONSTABLE'S SALES.**—Where the record of a constable's sale is silent as to whether due notice was given of the sale or not, the Court will presume that the constable did his duty.—*Culbertson v. Millikin*, 362

PRINCIPAL AND AGENT.

1. **SPECIAL AGENT—POWER.**—A party who deals with one who is a special agent to perform a particular act, is bound to ascertain his power, and the act of such agent beyond his power, does not bind his principal.—*Berry v. Anderson*, 36
2. **CONTRACT.**—It seems that, if money due to a principal on an illegal transaction be paid to his agent for him by the party from whom

it is due, the principal may recover it from the agent, for the contract or obligation to pay the money to his principal is not connected immediately with the illegal transaction, but grows out of the receipt of the money by the agent for the use of his principal.

—*Daniels v. Barney*, 207

3. PROFITS BY AGENT.—As a general rule, in all cases where a person is, either actually or constructively, as agent for another, all profits and advantages made by him in the business of the agency, beyond his ordinary compensation, will belong to his principal.—*Lafferty v. Jelley*, 471

PRINCIPAL AND SURETY.

1. DISCHARGE OF SURETY.—Any material alteration of a contract, without the consent of the surety, will discharge him. The liability of surety can not be extended beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract.—*Judah v. Zimmerman*, 388

PRINTER'S FEES.

See *SHERIFF*, 1.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. LIEN—PRACTICE—JURISDICTION.—Creditors, who regularly institute these proceedings, acquire a lien upon the claim intended to be reached, from the time of the service of process on the defendant, and the subsequent assignment of the claim does not divest that lien; nor is it divested by a subsequent amendment of the original affidavit.—*Cooke v. Ross*, 157
2. It is doubtful whether section 522, 2 G. & H. 261, contemplates the formation of issues as in ordinary cases. *Ibid.*
3. *Seemle*, that where these proceedings are instituted against *A*, a judgment debtor, and *B*, (who is indebted to *A*), for the purpose of reaching such indebtedness, the question as to the liability of *B* can not properly be raised by *A* in his pleadings. *Ibid.*
4. But, at least, it is competent for the plaintiff to waive the answer of the debtor, and, having done so, it is competent for the Court to refuse the debtor leave to file an answer and make new parties, &c. *Ibid.*
5. These proceedings may be instituted in a Court different from that in which the original judgment was rendered and out of which the execution was issued. *Ibid.*

PROMISSORY NOTES.

See INSURANCE, 5.

1. An instrument of writing, in the form of an ordinary bond issued by corporations, payable to *A* or bearer, for a certain sum, payable at a certain place, with interest coupons attached, is, in legal effect, a promissory note, and governed by the law merchant.—*The City of Aurora v. West*, 88
2. BONA FIDE HOLDER.—Mercantile paper made void *ab initio*, by statute, is void in the hands of a *bona fide* holder. *Ibid.*
3. ACTION—PROMISSORY NOTE.—*A* made his note payable to *B*, and *C* and *D* indorsed it. *B* sued *C* and *D* as joint makers of the note. The evidence showed conclusively that *C* and *D* placed their names on the note, not as makers, but as indorsers. Held that *C* and *D* were not liable in the action.—*Dale v. Moffitt*, 113
4. CONTRACTS—PAYMENT.—Notes payable on specified days can not be sooner paid without the consent of the payee. Notes will not be presumed to have been paid before they become due.—*Ebersole v. Redding*, 232
5. CONTRACTS—DUE DILIGENCE.—If the maker of a note be not liable to pay it, or if, from his want of means, no part of it could be collected of him by suit, no positive acts of diligence need be performed by the holder.—*Bernitz v. Stratford*, 320
6. SAME.—If the maker die a resident of the State in which he lived when the assignment was made, leaving property out of which the note or some part thereof might be collected, his estate, if the maker was liable when living, must be proceeded against before suing the assignor. *Ibid.*
7. SAME.—If the maker be alive, in the State where he resided when the assignment was made, and be liable on the note, and have any property subject to execution on a judgment against him, he must be sued before the holder can sue the assignor, but, if the maker become a non-resident after the assignment, the holder need not follow and sue him out of the State; nor, if he leave property in the State, is the holder required to proceed against it by attachment. *Ibid.*
8. DUE DILIGENCE.—Where the maker of a note dies before its maturity, and the note is then duly filed as a claim against his estate, and then his administrator resigns and no other is appointed, due diligence requires that the claimant on the note, in order to retain the liability of the assignor, should apply for the appointment of another administrator, or institute an action against the heirs of the estate and procure an order subjecting the property inherited by them to the payment of the note.—*Litterer v. Page*, 337

RAILROADS.

1. **RAILROADS—LIABILITY—FOR ANIMALS.**—By statute, in this State, 1 G. & H. 342, railroad companies are liable for animals, but not persons, injured upon their roads, where they might be, but are not fenced, irrespective of the question of negligence.—*Thayer v. The St. Louis, Alton, &c., R. R. Co.*, 26
2. **SAME.**—But where a proper fence is maintained, and in places where it is not required to be, they are not liable for animals injured, except as at common law, where there is negligence on their part, and the negligence of the owner of the stock does not contribute to its immediate injury. *Ibid.*
3. **SAME—FOR GOODS.**—They are liable, as common carriers, for goods lost or injured; but, by special contract, they may limit this liability. *Ibid.*
4. **SAME—FOR PERSONS NOT PASSENGERS.**—They are liable for injuries done to persons, not passengers, when the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute; and this may include wanton injuries by the companies, where there may be negligence on the part of the injured party. • *Ibid.*
5. **SAME—PASSENGERS—DEGREE OF CARE.**—They are liable as public carriers of passengers for injuries resulting from neglect to use the utmost care of cautious persons, unless that liability is restricted by special contract. *Ibid.*
6. **SAME—TO EMPLOYEES.**—They are not liable to one employee for injuries occasioned by another, where both are engaged in the same undertaking; nor does it make any difference that the injury, in the given case, happens to one employee, by the negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he can not guard. *Ibid.*
7. **SAME.**—But they may be liable to employees for injuries happening to them through the negligence of the company; which negligence may consist in the employment of incompetent persons in the management of the road and trains, or of unsafe machinery in the running of them, or of using the road when defective, &c., if the injuries actually happen from such causes, and the employee injured have not the same means of knowledge of the existence of such causes as the employer. *Ibid.*
8. **SAME—NOTICE.**—A railroad corporation, as well as its directors, is chargeable with notice of the time, place, and manner of the location of its road.—*The City of Aurora v. West*, 88

9. **RAILROADS—TERMINUS.**—A railroad running through, is a railroad running to a city; and if a city is authorized to subscribe stock to a railroad running to it, and it is not made a point in the charter of such road, it can only be made so by subsequent action of the directors of the railroad corporation, and until such action has been had, no absolute subscription of stock in such corporation can be made by such city. *Ibid.*
10. **RAILROADS—LIABILITY OF FOR STOCK.**—Where a railroad is not securely fenced, the company is liable for stock killed by its cars, without reference to the question of negligence. 1 G. & H. 522.—*McKinney v. The Ohio, &c., R. R. Co.*, 99
11. **SAME—RECEIVER.**—A railroad company is liable for stock killed by its cars, in such case, although the road is at the time operated by a receiver duly appointed by a competent Court. *Ibid.*
12. **CONTRACT—TRUST DEED—MORTGAGE.**—A deed of trust, executed by a railroad company to a trustee, to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, in the granting clause of which the following words are used, "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter acquire, with the superstructure, rails, and other materials used thereon," must be construed to embrace wood provided for the use of the road from time to time.—*Coe v. McBrown*, 252
13. But such deed of trust is, in legal effect, only a mortgage, and the company have a right to redeem, and that right is a leviable interest, which may be sold on execution. *Ibid.*
14. And a sheriff having a valid execution against such a railroad company, has a right to levy upon and sell its interest in the property of the company, and can not be enjoined from doing so, but the purchaser at such sale would not be entitled to the possession of the property sold until he had complied with the conditions of the mortgage. *Ibid.*
15. **TAXATION.**—A railroad company should be taxed, under the law as it now stands, for its "road" as an entirety, including all property in any way used by it in running or operating the road. But the real estate owned by a railroad company, or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as the real estate of private individuals.—*The Toledo, &c., R. R. Co. v. The City of Lafayette*, 262
16. **ACCEPTANCE OF CHARTER—CONSTITUTIONAL LAW.**—As to what acts on the part of the incorporators constitute an acceptance of a special charter, see the opinion at length.—*The State, &c. v. Dawson*, 272

17. **THE FORT WAYNE AND SOUTHERN RAILROAD COMPANY.**—The incorporators having accepted the charter before the Constitution of 1851 took effect, it became a valid and binding contract between them and the State, which could not be abrogated or impaired, except for cause. *Ibid.*
18. **FENCES—LIABILITY FOR DAMAGES.**—The statute requiring railroads to be kept fenced, is not intended to change the common law rule as to the duty of the owner of cattle, nor merely to give them compensation for animals killed or injured on the track where the road is not fenced, but chiefly as a police regulation, for the benefit of the public, to secure the safety and freedom from obstructions to the passage of carriages along the track.—*The Toledo, &c., R. R. Co. v. Fowler*, 316
19. **SAME.**—Where a railroad company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured, before the company has notice, the company is without fault, and not liable for the stock thus killed or injured. *Ibid.*
20. **DAMAGES—MUTUAL NEGLIGENCE.**—Where there is mutual negligence, if the defendant can not avoid the accident by reasonable care and skill, the plaintiff can not recover; nor can he recover where his negligence is proximate, and directly and materially contributes to the result, if the defendant could not have avoided the accident by ordinary care.—*The Indianapolis, &c., R. R. Co. v. Wright*, 376
21. **ASSESSMENTS.**—Section 697, 2 G. & H. 314, makes the complaint and return, as to the defendant, in an application for the assessment of damages against a railroad company, a cause of action, and authorizes him to raise issues of law upon them by the ordinary modes used in Courts of this State, which, being disposed of, may be followed by issues of fact, to be formed and tried according to the usual practice in civil cases.—*The Cincinnati, &c., R. R. Co. v. McFarland*, 459

RECEIVERS.

See JUDGMENT, 5.

RELATOR.

See AUDITOR OF STATE, 1.

REPLEVIN.

1. **PRACTICE—REPLEVIN—TITLE.**—Where, in an action of replevin,

the writ is quashed for a defect in the affidavit, and thereupon the cause is dismissed by the plaintiff, the question of title to the property in dispute is not settled.—*Stockwell v. Byrne*, 6

2. SAME—REPLEVIN BOND—DAMAGES.—In an action by the obligees against the obligors in a replevin bond, where the title to the property was not determined in the replevin suit, and the title thereto, and the right of possession is in a person, other than the obligees, they are only entitled to nominal damages. *Ibid.*

REPLEVIN BAIL.

1. REPLEVIN BAIL—RETAINER.—A replevin bail for the stay of execution, who has paid a part of the judgment, and afterwards at a sale of the property of his principal, by the sheriff, on an execution issued thereon, becomes the purchaser thereof, for a sum greater than the balance due, has the right, against junior creditors in whose favor executions are, at the time, in the hands of such sheriff, to retain the overplus to an amount sufficient to satisfy the sum paid by him as such bail.—*Coldrove v. Cox*, 43
2. EFFECT OF RECOGNIZANCE OF BAIL—ACTION.—By section 427, *id.*, the recognizance of bail given in such case, operates as a judgment confessed, in favor of the judgment plaintiff, and against the replevin bail, for the sum of money found due by the Court; and the undertaking or recognizance of bail will support an action against such bail, for any balance due, after the property ordered to be sold is exhausted.—*Niles v. Stillwagon*, 143

RESCISSION OF CONTRACTS.

1. RESCISSION OF CONTRACT—FRAUD.—If a purchaser of property desires to rescind a contract for fraud, practiced by the seller, he must show a return of the property, or an offer to return it, or that it was of no value whatever.—*Love v. Oldham*, 51
2. SAME—BREACH OF WARRANTY.—But a rescission of contract is not the only remedy of such purchaser. If fraud has been practiced, or there has been a breach of warranty, he may stand to the bargain and recover damages for the fraud, or he may rescind the contract and return the thing bought, and receive back what he paid or sold. *Ibid.*
3. ILLEGAL CONTRACT—RESCISSION.—A party to an illegal executory contract may rescind or repudiate it, and an executed contract subsequently made, inconsistent with it, will amount to a rescission or repudiation of it.—*Lafferty v. Jelly*, 471

RULES OF SUPREME COURT.

See P. XV, OF MATTER PRECEDING THE TEXT.

SALE.

1. **CONTRACTS—SALE—FRAUD.**—Where there has been a sale, and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vender.—*Harris v. Mercer*, 329

SET OFF.

1. **PLEADING.**—A claim arising out of tort can not be set off against a demand arising out of contract.—*The Indianapolis, &c., R. R. Co. v. Ballard*, 448

SHERIFF.

See SHERIFF'S SALES, 2, 3.

1. **SHERIFF'S LIABILITY FOR PRINTER'S FEES.**—A sheriff is not personally liable for printer's fees for advertising, simply because he officially hands the advertisement to the printer, in the absence of special contract. The printer's fees may be collected as part of the costs in the case. And as the fee bill in the code does not fix the amount of expense the sheriff may incur for advertising, the Court may do so, under the provisions in 1 G. & H. p. 338.—*Gardner v. Brown*, 447

SHERIFF'S SALES.

See RAILROADS, 14.

1. **SALE—CONSENT—APPRAISEMENT.**—Where part of a judgment is directed to be collected without appraisement, and execution is issued thereon, and property of the judgment defendant levied upon, and such defendant consents that the officer having charge of the writ shall sell such property without appraisement, and the officer does sell the same without appraisement, such defendant is precluded from setting up the invalidity of the sale for that cause; and the purchaser at such sale, in the absence of actual fraud, acquires a good title to the property, as against third persons who are creditors of such defendant.—*Stockwell v. Byrne*, 6
2. **SHERIFF'S SALE—APPRAISEMENT.**—Where the law requires a sheriff to appraise property taken on execution, a sale without appraisement is a nullity.—*Evans v. Ashby*, 15
3. **SAME—PRESUMPTION.**—In the absence of proof on the subject, it will be presumed that the sheriff, in that respect, performed his duty *Ibid.*

4. **REPLEVIN BAIL—RETAINER.**—A replevin bail for the stay of execution, who has paid a part of the judgment, and afterwards at a sale of the property of his principal, by the sheriff, on an execution issued thereon, becomes the purchaser thereof, for a sum greater than the balance due, has the right, against junior creditors in whose favor executions are, at the time, in the hands of such sheriff, to retain the overplus to an amount sufficient to satisfy the sum paid by him as such bail.—*Colgrove v. Cox*, 43

SLANDER.

1. **PLEADING.**—In complaints for slander, the words spoken should not be alleged with a *continuando*. Slanderous words spoken at one time, constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action, but if relied upon, they should be separately pleaded in separate paragraphs.—*Swinney v. Nave*, 178
2. **SAME.**—It is unnecessary, but admissible, under the code, to answer in mitigation in actions of slander. Matter in mitigation may be given in evidence under an answer in justification. *Ibid.*
3. **WHAT CONSTITUTES SLANDER.**—To say of a physician that, "in my opinion the bitters that *A* fixed for *B* were the cause of his death," is not actionable *per se*, and such words do not, in their usual sense, import a charge of murder.—*Jones v. Diver*, 184
4. **SAME.**—But the words, pleaded with a proper colloquium, that "the bitters that *Dr. Diver* gave to *John Smith* caused his death; there was poison enough in them to kill ten men," are actionable *per se*, because they imply a charge of gross misconduct and complete unfitness of the physician to be employed in his profession. Where words spoken of a professional man only impute ignorance or want of skill in a particular case, they are actionable only where they cause special damage. *Ibid.*

SPECIAL FINDING.

1. **PRACTICE—SPECIAL FINDING.**—A special finding must be in writing, so that an exception may be taken; and it must be filed with the clerk, so that he can enter it, and the exception to it, of record. And as evidence of its genuineness to an appellate Court, it should be signed by the judge, or incorporated in a bill of exceptions signed by him.—*The Peora Marine, &c., Co. v. Walser*, 73

SPECIFIC PERFORMANCE.

See WIDOW, 5.

STAMP DUTIES.

1. CONSTITUTIONAL LAW.—The provision of the internal revenue act of July 4, 1864, requiring writs in State Courts to be stamped is not within the sphere of the legislative powers of the Federal Government, and is inoperative.—*Warren v. Paul*, 276

STATUTES CONSTRUED.

See WILLS, 1, 2. TRUSTS, 3. PROCEEDINGS SUPPLEMENTARY TO EXECUTION, 1, 2, 3, 4.

1. STATUTES—REPEAL.—The act of February 12, 1855, 2 G. & H. 11, providing for extending the terms of Circuit Courts, by adjournment, &c., was not repealed by the act of December 24, 1858, *id.*, but is still in force.—*Cordell v. The State*, 1
2. SAME—RE-ENACTMENT.—The re-enactment of an existing provision of law, in a later statute, does not necessarily repeal such former provision. *Ibid.*
3. SAME—INOPERATIVE.—The act of December 24, 1858, 2 G. & H. 11, did not pass both houses of the legislature, and consequently never became a law. *Ibid.*
4. WITNESS—STATUTES CONSTRUED.—A defendant who is "sworn at the instance of and examined by the Court," without the solicitation of the plaintiff, and whose statements have no bearing against him, has no right, by virtue of §§ 295 and 300, 2 G. & H. 188, to insist on testifying fully as to all matters in controversy in the suit.—*Crisman v. Smith*, 13
5. STATUTES CONSTRUED.—There is no conflict between § 21, 1 G. & H. 295, and § 43, 2 *id.*, 495. The former gives to the widow the right to 300 dollars worth of the personal property of her deceased husband, at any time before the sale thereof, and if she does not take the same, then, to 300 dollars, out of the proceeds of such sale, but does not specially provide that she may receive the same before the return of the inventory, nor point out the duty of the administrator in that behalf; and the latter provides that she shall be entitled to select, and take it before the return of the inventory, and defines the duty of the administrator in that respect.—*Hamilton v. Matlock*, 47
6. SAME—ACTION—INJURIES BY MILL-DAM.—A party who is injured by the erection of a mill-dam, is not deprived by the statute, 2 G. & H. 310, of his remedy for such injury, by action at common law, unless the damages have been assessed by writ of assessment, and such assessment confirmed by the Court and paid within the year after confirmation.—*Lane v. Miller*, 104

7. CHANGE OR VENUE.—Where a change of venue is taken from a judge of Circuit Court, such judge is authorized by the statute, 2 G. & H. 154-5, to appoint a judge of the Court of Common Pleas to try the cause. *Ibid.*
8. CONSTITUTIONAL LAW.—The 12th section of the act entitled "an act concerning the unlawful detention of lands, and the recovery thereof," 2 G. & H. 630, is within the title of said act.—*Sturgeon v. Hitchens*, 107
9. COSTS.—Action by *A* against *B* for trespass in entering upon lands, and cutting and removing timber. *B* answered by, 1. A denial. 2. That he was the owner, &c., of the lands described in the complaint. *A* replied by a denial; and accompanied his reply with an affidavit that title to land was in issue, and a motion that the case be transferred to the Circuit Court. The motion was granted. The case was tried in the latter Court, and a judgment on verdict, rendered in favor of *A*. *B* made a motion to tax all the costs which had accrued in the Common Pleas, except the costs of the summons and its service, against *A*. This motion was overruled, except as to the costs occasioned by the transfer. *B* appealed, and insisted that his motion should have been sustained.
Held, that section 11, 2 G. & H. p. 22, should be construed to give the Circuit Court some latitude of discretion in each case that may arise under the clause thereof wherein the word "may" occurs; and that, so far as appeared from the record, there was no abuse of a sound discretion, in the judgment as to costs, given by that Court.—*Allen v. Wells*, 118
10. LANDLORD AND TENANT—FORFEITURE OF LEASEHOLD.—The failure of a tenant to pay rent will not work a forfeiture of his estate, unless it is so expressed in the lease or agreement.—*Brown v. Bragg*, 122
11. SAME—STATUTES CONSTRUED.—The words "all general tenancies," in section 2, 2 G. & H. p. 359, mean such tenancies only as are not fixed and made certain in point of duration, by the agreement of the parties. *Ibid.*
12. SAME.—*Semble*, that the words, "or for a shorter period," in the same section, embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties, as less than a year. *Ibid.*
13. ESTATES FOR YEARS.—Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great. *Ibid.*
14. JUDGMENT OF FORECLOSURE REPLEVIABLE.—Where, in a judgment of foreclosure, the amount due is found by the Court, and

- the mortgaged property ordered to be sold to satisfy the same, such judgment is repleviable under section 420, 2 G. & H. p. 233, although judgment is not given for the recovery of the money.—*Niles v. Stillwagon*, 143
15. EXEMPTION OF PROPERTY.—Section 3, 2 G. & H. p. 370, does not operate as an absolute exemption of 300 dollars' worth of property in favor of the debtor, without any acts on his part, but only relates to such real estate as had been duly exempted under the other provisions of the exemption law, before the execution of the sale or mortgage of the same by the husband without the consent of his wife.—*Sullivan v. Winslow*, 153
16. PAUPERS—COUNTY POOR.—It is not the intention of the poor laws of this State to require that all persons needing temporary relief shall be removed to the county asylum before receiving it.—*The Board, &c., of Bartholomew Co. v. Wright*, 187
17. SAME.—It is the obvious general purpose of the poor laws of this State to make the mode of giving relief to paupers a county system and not a township system, and to make the township trustees subordinate to the county commissioners. *Ibid.*
18. MUNICIPAL TAXATION—CITY OF NEW ALBANY.—Under the act of March 11, 1861, it is competent for cities organized under the general municipal law of the State, to assess and collect taxes for the year 1861, upon stock in any of the free banks of the State, located in such cities, whether owned by persons residing in such cities or elsewhere.—*DePauw v. The City of New Albany*, 204
19. SAME.—A later law, embracing the subject of a former one, by implication repeals the former so far as they conflict with each other. *Ibid.*
20. EVIDENCE.—Section 132, 1 G. & H. 103, is not inconsistent with section 283 of the code, *supra*, but is cumulative in its provisions.—*Wells v. The State, &c.*, 241
21. LIQUOR LICENSE—APPEAL.—Where a license to sell liquor is refused by the county board, and the applicant, under the provisions of the act of March 11, 1861, appeals to the Circuit Court or Court of Common Pleas, the decision of such Court is final, and no appeal lies therefrom to the Supreme Court.—*The Board, &c. v. Lease*, 261
22. STATUTORY CONSTRUCTION.—Statutes must be construed prospectively, unless they clearly import a different intention on the part of the Legislature.—*Hopkins v. Jones*, 310
23. WIDOW—DESCENT—SPECIFIC PERFORMANCE.—Where a widow, as the heir of her husband, becomes the owner in fee, of real estate, under the provisions of sections 17 and 18 of the act regulating

- descents, whilst she remains his widow, she has the legal right to alienate such real estate, and such alienation will convey a perfect and absolute title, and if she sell by title bond, and put the purchaser in possession, and then marry again, she may, after such marriage, be compelled to specifically perform such contract by conveying the legal estate.—*Newby v. Hinshaw*, 334
24. GUARDIAN AND WARD.—The requirement in the statute that, before any one shall be appointed guardian, he shall file a statement of the ward's estate, is directory only, and failure to file such statement would not of itself render an appointment void.—*Lee v. Ice*, 383
25. RAILROADS—ASSESSMENTS.—Section 697, 2 G. & H. 314, makes the complaint and return, as to the defendant, in an application for the assessment of damages against a railroad company, a cause of action, and authorizes him to raise issues of law upon them by the ordinary modes used in Courts of this State, which, being disposed of, may be followed by issues of fact, to be formed and tried according to the usual practice in civil cases.—*The Cincinnati, &c., R. R. Co. v. McFarland*, 459
26. TEMPERANCE LAW.—Under the temperance law of 1859, 1 G. & H. 617, there is no penalty against a person, licensed according to the act, for selling on *Sunday*.—*Hingle v. The State*, 462
27. STATUTES CONSTRUED—FORFEITURE OF ROAD CHARTER—CONSTITUTIONAL LAW.—The title of the act of March 5, 1859, 1 G. & H. 491, is sufficient to embrace a section authorizing the forfeiture of a charter as to a part of a road.—*The Central Plank Road Co. v. Hannaman*, 484
28. SAME.—Said act authorizes the forfeiture of less than the whole of the portion of any road which may be within any one county. *Ibid.*
29. MUNICIPAL CORPORATIONS—POWER TO MAKE SEWERS, &c.—Under sections 59, 66, 68 and 69, of the general act for the incorporation of cities, it is competent for the common council of any city organized under that act to construct sewers, and assess the expense thereof upon the owners of the adjoining lots, in the same manner in which the expense of ordinary street improvements may be assessed.—*The Board of Commissioners of Allen Co. v. Silvers*, *Ibid.*
30. SAME—STATUTES CONSTRUED.—The words, in section 66, "or for either kind of improvement, or for a full improvement in general," have reference to and embrace all the improvement authorized by the 59th section of said act. *Ibid.*
31. SAME—APPEAL UNDER § 69.—Where an appeal is taken under this section, it is not competent for the appellate Court to inquire

whether the petitioners for the improvement were resident of the city; or whether the petition had been signed by the requisite number of persons owning property on the street; or whether two-thirds of the councilmen concurred in making the improvement without petition; or whether the contractor was the lowest and best bidder; or into any other *fact* which arose before the making of the contract. *Ibid.*

32. **STATUTORY CONSTRUCTION.**—Acts involving questions of constitutional law should be strictly construed, unless, on applying the usual rules of construction, doubt should still exist whether the enactment is constitutional, and, in such case, the doubt should be solved in favor of the action of the Legislature. *Ibid.*

33. **SAME—STATUTES CONSTRUED.**—That part of sec. 69 prescribing the form of judgment to be rendered on appeal may be unconstitutional, and may be regarded as stricken out without materially changing the law, because, under the general provisions of the same law, the contractor would be entitled to the same relief substantially. *Ibid.*

SURETY.

When discharged. See **PRINCIPAL AND SURETY**, 1.

TAXATION.

1. **MUNICIPAL TAXATION—CITY OF NEW ALBANY.**—Under the act of March 11, 1861, it is competent for cities, organized under the general municipal law of the State, to assess and collect taxes for the year 1861, upon stock in any of the free banks of the State, located in such cities, whether owned by persons residing in such cities or elsewhere.—*DePauw v. The City of New Albany*, 204
2. **TAXATION—CONSTITUTIONAL LAW.**—The right of the State to impose taxes upon the citizen, and the duty of the latter to pay the same, do not rest upon contract, but are limited only by the fundamental law of the State. *Ibid.*
3. **MUNICIPAL LAW.**—Cities, organized under the general law of the State, are authorized to levy an *ad valorem* tax on all property within the cities respectively, and subject to State and county taxation.—*The Toledo, &c., R. R. Co. v. The City of Lafayette*, 262
4. **RAILROADS.**—A railroad company should be taxed, under the law as it now stands, for its "road" as an entirety, including all property in any way used by it in running or operating the road. But the real estate owned by a railroad company, or held by it in trust, and not used in running or operating the road, should be taxed in the same manner as the real estate of private individuals. *Ibid.*

TRUSTS.

1. LIMITATIONS—TRUSTS.—Mere lapse of time constitutes no bar to a bill to enforce a subsisting trust, and time begins to run against a trust only from the date of its open disavowal.—*Cunningham v. McKindley*, 149
2. SAME.—Even unjustifiable delay and gross inattention on the part of some of the *cestui que trusts* furnish no bar to relief against persons conversant with the trust. *Ibid.*
3. LIMITATIONS—STATUTES CONSTRUED.—Section 220, 2 G. & H. p. 163, relates to causes of action originally arising upon promises or contracts, and not to continuing trusts, and especially those arising by operation of law. *Ibid.*

VARIANCE.

1. PRACTICE.—In actions upon notes and mortgages, any variances between the averments in the complaint and the causes of action filed with it, may be amended on motion, and will be deemed corrected in this Court.—*Ebersole v. Redding*, 232
2. PRACTICE—VARIANCE.—Where it is averred in the complaint that the note sued on was indorsed to the plaintiff by *Caleb Hendee*, and the note offered in evidence on the trial is indorsed by *C. Hendee*, the variance will not be material and the indorsement on the note will be admissible in evidence.—*Carpenter v. Sheldon*, 259

VENDORS AND PURCHASERS.

See SHERIFF'S SALES, 1. RESCISSION OF CONTRACTS, 1, 2.

RAILROADS, 14.

1. DEED—DELIVERY OF—ONUS PROBANDI.—The possession of a deed is *prima facie* evidence that it has been legally delivered, and the *onus* of proving the contrary devolves on the person who seeks to set it aside.—*Berry v. Anderson*, 36
2. SAME—WHAT CONSTITUTES A DELIVERY.—To constitute a delivery of a deed there must be an intention to part with the control over it as its owner. *Ibid.*
3. SAME—ESCROW.—Where a deed is delivered to a third person to hold for the parties, until the happening of a given event, it is called an *escrow*, and a delivery, by such such person, to the grantee named in the deed, before the happening of the event, vests no title in him, and he can convey none. *Ibid.*
4. SPECIAL AGENT—POWER.—A party who deals with one who is a special agent to perform a particular act, is bound to ascertain his

power, and the act of such agent beyond his power, does not bind his principal. *Ibid.*

5. **ESTOPPEL—BONA FIDE PURCHASERS.**—A man may be estopped by his acts from asserting title to land which he has not conveyed, as against a *bona fide* purchaser of such land, but the facts in this case do not constitute an equitable estoppel. *Ibid.*

6. **DELIVERY—TITLE.**—Where a party delivers a deed, or property to another, with intent to convey to him, the title passes, even though the intention was raised by fraud or false pretenses, but such title is voidable on account of the fraud, &c., though if such title is conveyed to a *bona fide* purchaser before avoidance, it becomes in him a complete and absolute title. But where no title passes, the pretended purchaser can have none to convey, and there being no estoppel intervening, the original owner may reclaim. *Ibid.*

7. **ESCROW.**—For a statement when, and the cases in which the question of the delivery of an instrument in writing as an *escrow*, or otherwise, arises, see the latter part of the opinion in this case. *Ibid.*

8. **DEED—RATIFICATION—ADVERSE POSSESSION.**—Suit for the recovery of land. The land was granted to *A* by a treaty between the *United States* and the *Pottowattomie* tribe of Indians, made October the 16th, 1826. U. S. Statutes at Large, pp. 295, 299. The grant, Art. 6, was in these words: "The *United States* agree to grant to each of the persons named in the schedule hereunto annexed, the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed, by either of the said persons, or their heirs, without the consent of the President of the *United States*." *A*, on the 13th day of *June*, 1836, without the consent or approval of the President, executed and delivered to *B* a deed conveying to him the land in dispute; but the deed thus made was afterwards, on the 14th day of *December*, 1846, approved by *James K. Polk*, the then President of the *United States*. When the land was thus conveyed by *A* to *B*, there was no adverse possession, but in 1843 *C* went into possession of the land, and at the time of the approval of the deed, by the President, held it adversely.

Held, that the deed from *A* to *B* could not, without the consent of the President, operate as a conveyance, but that his consent to its execution might be given before or after its execution.—*Ashley v. Eberts*, 55

9. *Held*, also, that the act of the President, in his approval of the deed, related back and gave it validity from the time of its execution, so as to protect *B* against the claim, by adverse possession, of *C*, which arose in the interim between the date of the deed and the date of its confirmation by the President. *Ibid.*

10. MORTGAGE—INSTRUCTIONS TO JURY.—*A* and *B*, being the owners of a certain tract of land, subscribed the same to the *D* railroad company. The railroad company subsequently conveyed the land to *E* and *F*, who afterwards conveyed the same, with other lands, by deed in fee, absolute on its face, to *G*, who died leaving the plaintiffs his heirs at law. A witness testified that *E* and *F* had contracted to build the road, and in "order to enable them to raise money and go on with the work *G* had indorsed largely for them, and the lands were conveyed to him to indemnify him as such indorser." Upon the evidence thus adduced the Court charged as follows: "The defendants insist that the conveyance by *E* and *F* to *G*, the ancestor of the plaintiffs, was intended only as a mortgage security, and was for that purpose made, and although absolute on its face, the defendants have a right to show that it was intended only as a mortgage. And if it was given by *E* and *F* to *G*, to secure him against loss, on account of his security for them, it would only amount to a mortgage, and if only a mortgage, the plaintiffs can not recover unless they were purchasers without notice."

Held, that the instruction thus given was pertinent to the issue, consistent with the proofs, and therefore properly given.—*Smith v. Purks*, 59

11. CONTRACT—RESCISSION OF.—Where *A* sells and conveys land to *B*, and the deed, before it is duly recorded, is lost, and *A* then sells and conveys the same land to *C*, who has full notice of the former sale and conveyance to *B*, the title in *B* is no way impaired, and the conveyance to *C*, under the circumstances, is a nullity, and gives no right to *B* to rescind or recover back the purchase money paid to *A*.—*Harrington v. Finney*, 340

12. MORTGAGE—WHAT CONSTITUTES.—Where *A* borrows of *B* a sum of money, and gives his note therefor, and at the same time executes a deed conveying certain real estate to *B*, reciting in the deed a consideration just equal to the note, and, at the same time *B* executes a bond to *A*, conditioned that, upon the payment by *A* of said note, he would reconvey said real estate to him, the facts, taken together, constitute *prima facie* a mortgage of the real estate by *A* to *B*.—*Crassen v. Swoveland*, 427

13. EFFECTS OF CONTINUED POSSESSION.—Possession of real estate is only constructive notice to all the world of the rights of the party in possession; but it is held that the continued possession by the grantor of land after the making of his deed, will not be notice of a defeasance held by him which is not recorded. *Ibid.*

VENUE—CHANGE OF.

1. STATUTES CONSTRUED—CHANGE OF VENUE.—Where a change of
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venue is taken from a judge of a Circuit Court, such judge is authorized by the statutes, 2 G. & H. 154-5, to appoint a judge of the Court of Common Pleas to try the cause.—*Lane v. Miller*, 104

VOLUNTARY ASSIGNMENT.

1. CLAIMS AGAINST ASSIGNEE.—The proceedings for the collection of claims against the estates of decents and of claims against the estates of voluntary assignors are so similar, that, wherever the rules touching the former are applicable, they should govern in relation to the latter, and the formation of issues on such claims, either of law or fact.—*Gifford v. Black*, 444

WAIVER.

See INSURANCE, 4. JUDGMENT, 2.

1. JURISDICTION.—The provision that a defendant shall not be sued out of his township, is for his personal advantage, and may be waived. Jurisdiction of the person, but not of the subject matter, may be conferred by consent.—*Gage v. Clark*, 163
2. ERRORS WAIVED.—Error in the progress of a trial, which is not made the basis of a motion for a new trial, is waived, and section 347 of the code, 2 G. & H. p. 210, does not dispense with the necessity for the motion of a new trial on the ground of the supposed error.—*Garver v. Daubenspeck*, 238

WIDOW.

1. DEMAND—WIDOW.—A demand, by a widow, on the administrator of her deceased husband, for the 300 dollars worth of personal property allowed her by statute, 2 G. & H. 295, § 21, is in these words: "Squire, I have concluded to take my 300 dollars in property," is sufficient.—*Hamilton v. Matlock*, 47
2. SAME—REFUSAL.—Where an administrator refuses to deliver such property, on request, it is not necessary for the widow to make a specific selection of the articles she desires to take. *Ibid.*
3. STATUTES CONSTRUED.—There is no conflict between § 21, 1 G. & H. 295, and § 43, 2 *id.* 495. The former gives to the widow the right to 300 dollars worth of the personal property of her deceased husband, at any time before the sale thereof, and if she does not take the same, then, to 300 dollars, out of the proceeds of such sale, but does not specially provide that she may receive the same before the return of the inventory, nor point out the duty of the administrator in that behalf; and the latter provides that she shall be entitled to select, and take it before the return of the inventory, and defines the duty of the administrator in that respect. *Ibid.*

4. MORTGAGE—WIDOW'S ESTATE IN LANDS OF HUSBAND.—Prior to *May 6, 1853*, *A* executed a mortgage upon certain real estate to *B*, his wife not joining, to secure the payment of certain sums of money then due from *A* to *B*, and of all sums that might thereafter become due. *A* died in 1858, leaving a widow. One-third of the mortgaged land was afterwards set off to the widow. *B* then foreclosed his mortgage and had a decree for the sale of the other two-thirds to pay the indebtedness which existed at the date of the mortgage, and which accrued after *May 6, 1853*, and it was sold and the proceeds were only sufficient to pay that part of the debt which existed at the date of the mortgage. *B* claims a right to subject the widow's third to the payment of the subsequent indebtedness, on the ground that her dower estate in the land was abolished by the legislature, and her contingent fee therein never attached by reason of the mortgage.

Held, that, under the circumstances, *B* had no claim under the mortgage upon the third set off to the widow.—*Morton v. Noble*, 160

5. DESCENT—STATUTES CONSTRUED—SPECIFIC PERFORMANCE.—Where a widow, as the heir of her husband becomes the owner in fee, of real estate, under the provisions of sections 17 and 18 of the act regulating descents, whilst she remains his widow, she has the legal right to alienate such real estate, and such alienation will convey a perfect and absolute title, and if she sell by title bond, and put the purchaser in possession, and then marry again, she may, after such marriage, be compelled to specifically perform such contract by conveying the legal estate.—*Newby v. Hinshaw*, 334

WILL.

1. WILL—SALE BY TRUSTEE—CURATIVE STATUTE.—In *February, 1851*, *A*, a *feme covert*, made her last will, which contained the following item: "I give and bequeath to my husband, *B*, the house and lot in *Y*, now occupied by us, being the same lot conveyed to me by my mother *C*, late of *Y*, deceased, bearing date *September 15, 1840*, for and during the natural life of said *B*, upon the condition that the said *B*, in a suitable proper and fatherly manner, provide for, and take care of our unfortunate daughter *D*, during their joint lives. And if in the judgment of the said *B*, at any time after my decease, it shall be necessary to the comfortable support of either the said *B* or *D*, that the aforesaid house and lot be sold, then I do hereby authorize and empower him, the said *B*, to sell and convey the same in fee simple, the same as he would were the same premises bequeathed to him in fee simple by me; and in that case my will is that the avails of the said property sold, be applied in part or in whole, as the circumstances of the said *B* and *D*, or either of them, may require, by the said *B*, to his and her comfortable support, according to his best judgment. In case the said *D* shall

survive her father, the said *B*, and the premises described above be unsold, at the time of his death, then I give and bequeath to our daughter *E*, in fee simple, the premises described above, upon the same conditions as above imposed upon my husband, the said *B*, provided that the said *E* shall be in suitable circumstances, and is willing to take upon herself the charge of said *D*. But should the said *E*, then not be in suitable circumstances, or be unwilling to take the care and support of the said *D* upon herself, then I give and bequeath the aforesaid premises to our son *F*, upon the same conditions as aforesaid; and shall he not take upon himself the charges aforesaid, then I give and bequeath the premises to our son *G*, upon the same conditions. And if all these persons shall fail to accept the bequest, and take upon them the charge of said *D*, as aforesaid, then I ordain that the said property shall be applied, under the instructions of the proper legal authority, to the comfortable maintenance and support of the said *D*," &c. *A* died in *March*, 1851. In *June*, 1852, the trust and power created by her said will passed, according to its terms, to *F*. On the 16th of *November*, 1852, the said *F* and *D*, being then residents of *I*, the said *F*, for the purpose of carrying out the objects of said trust, exchanged said property in *Y* to one *W*, for property in *I*, and took a deed from him for the same in fee, providing therein expressly that the same should be held by said *F*, "under the same restrictions, and subject to the same conditions in reference thereto as those imposed upon" him by said last will, concerning said trust, which deed was recorded *January* 27, 1853, of all which the defendants below had full notice; and on the 28th of *October*, 1853, the said *F*, conveyed said property in *I* to one *J*, under whom the said defendants hold. In *March*, 1857, said *F*, the trustee under the will of said *A* died; and on the 30th of *July*, 1858, *H*, the plaintiff below, was appointed, by the *M* Court of Common Pleas, successor in the trust to said *F*, deceased. At the *March* term, 1862, said *H* commenced an action in the Court below, to recover possession of the property in *I*, which was taken by *F*, the former trustee, from *W*, in exchange for the property in *Y*, bequeathed in trust for the support of the said *D*. *H* concedes the validity of the exchange between *F* and *W*, admits that the title of the *I* property passed to *F*, and puts the case upon the ground that *H* was powerless to afterwards divest himself of it.

QUÆRE.—Whether the will authorized the exchange of the *I* property for real estate situated any where.

Held, that *F* had the power to sell the real estate in *I*, if the exigencies of the trust, created by the will, required a sale; hence *bona fide* purchasers, that is, purchasers, ignorant of the propriety or not, of the sale would hold independent of the curative statute of *March* 7, 1863. Acts 1863, p. 16.—*Price v. Huey*, 18

2. *Held*, also, that if *F* acted erroneously, but honestly in making

such sale, the curative statute healed up the consequences of such error as to all persons. *Ibid.*

WITNESS.

1. WITNESS—STATUTES CONSTRUED.—A defendant who is "sworn at the instance of and examined by the Court," without the solicitation of the plaintiff, and whose statements have no bearing against him, has no right, by virtue of §§ 295 and 300, 2 G. & H. 188, to insist on testifying fully as to all matters in controversy in the suit.—*Crisman v. Smith*, 13
2. EVIDENCE—COLOR.—It is the duty of the Court to determine the competency of witnesses, and where the objection to the competency of the witness rests upon the allegation that he has such an amount of negro blood as disqualifies him to testify, the Court may, upon inspection, determine *prima facie* his competency, but if his blood be not sufficiently apparent for such mode of determination, then the Court may examine other witnesses, either to prove the blood of the witness from reputation amongst those who knew him, or to establish the character of his blood by the testimony of experts.—*Nave's Adm'r. v. Williams*, 368

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